92-906

Supreme Court, U.S.
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No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1992

BONNIE MOORE, ACCOUNTING CENTER, and
CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS,
*Petitioners,*
vs.
CALIFORNIA STATE BOARD OF ACCOUNTANCY,
*Respondent.*

**Petition for a Writ of Certiorari to the California Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, consistent with First Amendment protections for commercial speech, individuals permitted by law to perform basic accounting services without being licensed can be prohibited from using the generic terms "accountant" or "accounting."

2. Whether constitutional rights of free speech and due process protections essential to the enjoyment of those rights are violated by an appellate court's *sua sponte* decree forcing non-licensed accountants to accompany any use of the generic terms "accountant" or "accounting" with a mandatory disclaimer of licensed status, despite the fact that no statute or regulation authorizes such disclaimers and there was no evidence presented concerning the propriety or consequences of the disclaimer mandated by the appellate court, because both sides in the underlying action concurred that any remedy involving mandatory disclaimers would be inappropriate and unwise.

3. Whether constitutional due process standards are violated by a regulation which serves the economic self-interest of members on a licensee-controlled State Board by restricting the freedom of non-licensees to advertise or perform the services they offer in lawful competition with licensees.

## LIST OF ALL PARTIES

Petitioners were plaintiffs and appellants in the proceedings below. BONNIE MOORE is a college graduate with an accounting major who has never sought licensure as a certified public accountant. Instead, she has provided customers with the basic accounting services which non-licensed individuals may offer under California law, both as an individual and as the principal owner of ACCOUNTING CENTER, a California corporation. The CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS ("CAIA") is a non-profit association. Its membership includes both licensed and non-licensed accountants practicing in California.

Respondent is the CALIFORNIA STATE BOARD OF ACCOUNTANCY ("State Board"), a state agency with authority to license and regulate certified public accountants and to otherwise administer the California Accountancy Act. (Calif. Bus. & Prof. Code §§ 5000 et seq.)

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## OPINIONS BELOW

The 4-3 decision of the California Supreme Court issued on July 2, 1992 appears at 2 Cal.4th 999, and is reproduced (with dissenting opinions) beginning at Appendix page 1. A petition for rehearing was filed by Petitioners herein and was denied on August 27, 1992. The order denying the petition for rehearing is reproduced in the Appendix at page 43.

The decision of the intermediate California Court of Appeal, issued August 1, 1990, is reproduced beginning at Appendix page 44. An August 29, 1990 order of that court denying petitions for rehearing filed by *both sides* and amending its original opinion, is reproduced beginning at Appendix page 55.

The unreported Statement of Decision issued by the San Francisco Superior Court on March 16, 1989 is reproduced beginning at Appendix page 57.

## JURISDICTION

The decision of the California Supreme Court was rendered on July 2, 1992. A timely petition for rehearing was denied on August 27, 1992. This Petition for Writ of Certiorari is filed within 90 days of the order denying the petition for rehearing. This Court has jurisdiction to review the decision of the California Supreme Court under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are involved in this case:

1. First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Fourteenth Amendment to the United States Constitution, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

3. Section 5052, California Business and Professions Code:

> "Nothing in this chapter shall apply to any person who as an employee, independent contractor, or otherwise, contracts with one or more persons, organizations, or entities, for the

purpose of keeping books, making trial balances, statements, making audits or preparing reports, all as a part of bookkeeping operations, provided that such trial balances, statements, or reports are not issued over the name of such person as having been prepared or examined by a certified public accountant or public accountant.

Nothing contained in this chapter shall affect, limit or be construed as affecting or limiting the rights of any public accountant who met the requirements of prior statutes and who was registered with the board as a public accountant on or before December 31, 1955."

4. Section 5058, California Business and Professions Code:

"No person or partnership shall assume or use the title or designation 'chartered accountant,' 'certified accountant,' 'enrolled accountant,' 'registered accountant,' or 'licensed accountant,' or any other title or designation likely to be confused with 'certified public accountant' or 'public accountant,' or any of the abbreviations 'C.A.,' 'E.A.,' 'R.A.,' or 'L.A.,' or similar abbreviations likely to be confused with 'C.P.A.' or 'P.A.'; provided, that any person qualified as a certified public accountant under this chapter who also holds a comparable title granted under the laws of another country may use such title in conjunction with the title of 'certified public accountant' or 'C.P.A.' and provided, that any person enrolled to practice before the Internal Revenue Service and recognized as an enrolled agent may use the abbreviation 'E.A.' "

5. California Administrative Code, Title 16, Chapter 1, Article 1, Regulation 2:

"The following are titles or designations likely to be confused with the titles Certified Public Accountant and Public Accountant within the meaning of section 5058 of the Business and Professions Code: (a) 'Accountant,' 'auditor,' 'accounting,' or 'auditing' when used either singularly or collectively or in conjunction with other titles. (b) Any other titles or designations which imply that the individual is engaged in the practice of public accountancy."

## STATEMENT OF THE CASE

At stake in this case is the freedom of men and women who are permitted by law to perform basic accounting services for the general public, to advertise and practice effectively by using the generic terms which most accurately describe their status and the services they offer. Petitioners initiated this action to challenge a regulation of the California State Board of Accountancy which barred non-licensed accountants from all uses of the generic terms "accountant" and "accounting." The trial court upheld the State Board's regulation without limitation.

The intermediate California Court of Appeal agreed with petitioners that the State Board's absolute ban upon use of the generic terms could not be squared with this Court's decisions extending First Amendment protections to commercial speech. Rather than declaring the regulation invalid, however, the Court of Appeal announced a new restraint of its own invention by holding that every use of the generic terms by non-licensed persons must be accompanied by a mandatory disclaimer stating that the user is "unlicensed," or that the services offered do not require a license. Both sides filed petitions for rehearing on the grounds that the Court of Appeal's *sua sponte* disclaimer requirement was inconsistent with the State Board's regulation, unsupported by any evidence in the trial record, and unwise. Indeed, the trial court specifically found that "[R]equiring unlicensed persons to include negative disclaimer language in their advertising (e.g., 'not licensed by the Board of Accountancy') would create its own species of confusion for consumers and *is not viewed as acceptable by either of the parties to this litigation.*" (Appendix pp. 63-64.) (Emphasis added.)

Despite the irreconcilable conflict between its ruling and the record, the Court of Appeal denied both petitions for rehearing. The California Supreme Court subsequently affirmed the decision of the Court of Appeal by a 4-3 vote.

The constitutional issues posed by this petition were raised in the courts below. The complaint filed in 1986 challenged the State Board's regulation on First Amendment grounds:

> "15. Use of the generic terms 'accountant' and 'accounting' by plaintiffs and the members of the CAIA is a form of commercial speech which is protected by the First Amendment of the United States Constitution and by the Constitution of the State of California. In order to constitutionally regulate said commercial speech, the BOARD must comply with the constitutional requirements set forth by the United States Supreme Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission* 447 U.S. 557, 564, 65 L.Ed.2d 341 (1980) and its progeny. The BOARD's cease and desist orders against BONNIE MOORE and various CAIA members do not satisfy such constitutional requirements." (Complaint for Declaratory Relief and Permanent Injunction, dated 8/21/86 at p. 7.)

A Petition for Review filed with the California Supreme Court added due process objections addressing the Court of Appeal's *sua sponte* disclaimer requirement:

> "In summary, a court may only deal with the issues presented by the parties, and it is limited as well as by its constitutional role in passing upon the validity of statutes or regulations of administrative bodies created by the legislature. The courts can determine whether a given statute or regulation is valid or invalid, but they cannot rewrite the statute or regulation to save it from invalidity by limiting its scope in a manner inconsistent with its terms. A court may express the view that a more limited regulation would satisfy constitutional standards, but it cannot enter an injunction as if that more limited regulation had already been promulgated." (Petition for Review dated 9/10/90, at p. 17.)

An amicus brief filed by the California Center for Public Interest Law raised additional due process issues based upon the State Board's promulgation of regulations advancing the economic self-interest of its licensee members:

> "Additionally, CPIL urges this Honorable Court to recognize the following significant due process issue: where a rulemaking and adjudicatory body consists primarily of licensees belonging to a specific economic grouping (*e.g.*, one type of accountant) in competition with other similar practitioners, is it constitutional for those board members to use the power of the State to adopt and enforce rules of practice to their economic advantage against groups not represented in the relevant tribunal?" (Brief of Amicus Curiae Center for Public Interest Law dated 1/11/91, at p. 4.)

Both California appellate courts agreed that the State Board's blanket prohibition upon all uses of the generic terms could not satisfy First Amendment standards, because use of those terms by non-licensees was truthful and neither inherently, nor actually, misleading. (See Appendix pp. 22-27, and 51-52.) However, both courts erred by rewriting the regulation *sua sponte* to place new restraints upon use of the generic terms without any statutory or evidentiary basis. The senior justice of the California Supreme Court dissented from that result on First Amendment grounds. (See dissent of Mosk, J. at Appendix pp. 29-32.) Justice Mosk also expressed doubt that promulgation of such a clearly anti-competitive regulation by a licensee-dominated State agency could satisfy due process standards. (Ibid.) The majority opinion did not address the due process arguments advanced by petitioners or amicus.

The California Supreme Court has decided important issues of federal constitutional law in direct conflict with decisions of this Court. Its decision also conflicts with that of Maryland's court of last resort which invalidated an identical restraint, reserving to licensed accountants exclusive use of the same generic terms. *Comprehensive Accounting Service Co.* v. *Maryland State Board of Accounting* (Md. 1979) 397 A.2d 1019. ("*Comprehensive*").

Unless reviewed and corrected by this Court, the erroneous ruling of the California Supreme Court will violate the free speech rights of non-licensed accountants throughout California and will deprive all California citizens and businesses of the benefits they would enjoy if non-licensed accountants were free to advertise their lawful services effectively in competition with licensees. Unless review is granted, there is a substantial risk that other state and federal courts will perceive this decision by the highest court of the most populous state as authorizing the exercise of a new judicial power in dealing with unconstitutional restraints upon commercial speech — the power to impose *sua sponte* legislative solutions in such cases, even to the point of requiring mandatory disclaimers which are opposed by all parties and lack any statutory or evidentiary basis.

It has been less than twenty years since this Court extended First Amendment protections to commercial speech. *Virginia Pharmacy Board* v. *Virginia Consumer Council* (1975) 425 U.S. 748. Continued development of reasonable rules in this embryonic area of constitutional law requires careful review to ensure that a decision of a highly visible state court does not introduce new principles which will weaken the protections established by this Court for all commercial speech.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION OF THE CALIFORNIA SUPREME COURT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER STATE COURTS OF LAST RESORT

The California Supreme Court addressed a regulation which, by its express language and the consistent interpretation of the promulgating agency, reserved to licensees of the State Board exclusive use of the generic terms "accountant" or "accounting." All other accounting practitioners were thereby faced with this anomaly: They were specifically permitted by California law to prepare financial reports and perform other basic accounting services, but they could not call themselves "accountants" and

could not use the word "accounting" in reports prepared for clients (for example, by referring to "generally accepted *accounting* principles").

Every justice of the California Supreme Court agreed that the generic terms are truthful and accurate in describing the services performed by non-licensed persons under California Business & Professions Code section 5052 and in identifying those who perform such services. Justice Mosk said it most succinctly: ". . . it is axiomatic that those who perform accounting are accountants." (Dissenting Opinion at Appendix p. 29.)

Because the State could not satisfy its burden of proving that use of the generic terms was either inherently or actually misleading, a majority of the California Supreme Court held that the State Board's *absolute* prohibition upon use of those terms was unconstitutional. (See Appendix pp. 22-27.) That holding correctly applied principles enunciated by this Court for the protection of commercial speech. It also duplicated the *Comprehensive* ruling of Maryland's highest court, which declared invalid an identical prohibition against use of the generic terms by non-licensed accountants performing basic accounting services under Maryland law. However, the California Supreme Court did not rest with its finding that the State Board's absolute prohibition was unconstitutional. Instead, the majority turned to dicta from the *Comprehensive* opinion and various decisions of this Court suggesting that where commercial speech is potentially misleading, alternative forms of regulation less restrictive than an absolute prohibition (such as mandatory disclaimer requirements) *may* be constitutional. From that dicta, the majority mistakenly assumed that it had the power to fashion its own disclaimer remedy, *sua sponte*. That is where the majority erred. It failed to recognize that an essential underpinning of the constitutional protections afforded commercial speech is a requirement that the State satisfy a heavy burden of proof to justify *any* restraint — whether absolute or qualified.[1]

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[1]See, *e.g., In Re R.M.J.* (1982) 455 U.S. 191, at 200 n. 11 (State must justify restriction in light of "experience"); *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n* (1980) 447 U.S. 557, 570; *Bates*

Perforce, the State cannot satisfy its burden of proof to justify a mandatory disclaimer requirement where no evidence at all is offered concerning such a requirement. In fact, the State took the position in this case that the particular disclaimer requirement imposed by the appellate courts (mandating use of the term "unlicensed accountant") was inappropriate and would only serve to *increase* the risk that consumers would be misled.[2] In its Petition for Rehearing in the Court of Appeal, as well as its brief filed with the California Supreme Court, the State Board identified a series of problems inherent in replacing its absolute ban upon all uses of the generic terms with a requirement that non-licensed accountants add disclaimers or modifiers to any use of those terms. Among the problems which the State Board identified were:

1.) that "there is an obvious confusion inherent in the term 'unlicensed accountant . . . .' " (Respondent's Brief on the Merits in the Supreme Court at p. 43);

2.) any court approval of disclaimer language would open "a 'Pandora's box' of potential confusion by inviting unlicensed persons to test the limits of the state's regulatory authority and the boundaries of public confusion" (Ibid.); and

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v. *State Bar of Arizona* (1977) 433 U.S. 350, 381; *Linmark Associates, Inc.* v. *Township of Willingboro* (1977) 431 U.S. 85, 95 ("the record here demonstrates that respondents failed to establish that [their restriction] is needed"); and *Virginia Pharmacy Board* v. *Virginia Consumer Council*, cited *supra*, 425 U.S. at p. 769 (Commonwealth's justifications failed on "close inspection"). Affirmative disclosure requirements are subject to the same First Amendment protections. Therefore, the State bears the burden of establishing that any disclosure requirement is "reasonably related to the State's interest in preventing deception of consumers." *Zauderer* v. *Office of Disciplinary Counsel* (1985) 471 U.S. 626, 652.

[2]Petitioners agreed with this assessment. Hence, neither party had any reason (or opportunity) to offer evidence at trial on the impact or advisability of mandatory disclaimers.

3.) a specific disclaimer stating that certain services do not require a state license "is even more potentially confusing . . ." than no disclaimer at all (*Ibid.*, p. 44.).

The only record evidence which bears upon the potential impact of a mandatory disclaimer requirement reinforces the concerns raised by the State Board. In its discussion of the evidence, the majority opinion refers to a survey commissioned by the State Board in which over 50% of the Californians who were polled expressed a belief that anyone advertising accounting services to the public was legally required to be licensed before offering those services. (See Appendix at pp. 5-6.) The dissenting opinions cite the dangers of using opinion polls as a substitute for direct evidence and identify the deficiencies of this particular survey. However, if it has any weight and relevance, the survey evidence in this record only serves to illustrate the potentially disastrous consequences of the court-imposed mandatory disclaimer, both in creating greater public confusion and impairing the rights of non-licensed persons effectively to advertise their lawful services. If a majority of Californians believe that anyone using the term "accountant," or advertising "accounting services," must first be licensed by the State, then use of the term "unlicensed accountant" can only be regarded by that majority as an oxymoron — and possibly an admission that the user is offering accounting services illegally, because they do not have a license. The inevitable result is more, not less, public confusion and misunderstanding.[3]

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[3]A number of states specifically authorize non-licensees to use the generic terms accountant or accounting, apparently without encountering any significant problem of public confusion between accountants who are licensed or "certified" and those who are not. *E.g.*, Illinois Professions and Occupations Code, § 5534, ¶28(e); Nebraska Revised Statutes, § 1-164.03 and Washington Revised Codes, § 18.04.345(3). Many states have general statutory prohibitions against use of the title "certified public accountant" or any other title suggesting that the user is licensed by the state where that is not true, but none of those states has yet interpreted such a statute to bring the unadorned term "accountant" within its general proscription. *E.g.*, Alaska Statutes, § 08.04.540; Arizona Revised Statutes, § 32-747; Colorado Revised Statutes, § 12-2-

The California Supreme Court's decision is in conflict with the recent decision of this Court in *Peel* v. *Attorney Disciplinary Comm'n of Ill.* (1990) 496 U.S. 91. The majority conceded in *Peel* that references to certification by a "national board of trial advocacy" might potentially mislead the public to believe that an attorney was certified by the State as a trial advocate. Nevertheless, it held that mere *potential* for confusion was insufficient to "satisfy the state's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public . . . ." (496 at p. 109.) The *Peel* opinion also contains dicta suggesting that the State might constitutionally adopt the less restrictive alternative of requiring a disclaimer concerning the certifying organization or its standards. (496 U.S. at p. 110.) However, the Court held Illinois' absolute prohibition invalid and left the Legislature or Bar of that state to decide what, if any, disclaimer requirement should be enacted. Maryland's highest court reached the same result in *Comprehensive.* But the majority opinion below *upheld* an identical prohibition by imposing a disclaimer condition which, if appropriate, could have been mandated as easily by this Court in *Peel*, or Maryland's highest court in *Comprehensive.*

Justice White argued in a dissenting opinion that this Court should have upheld the lower court's sanctions in *Peel* on the grounds that a disclaimer *might* constitutionally be required, and there was no disclaimer in plaintiff's professional advertisements. No other justice joined in that dissent, or voiced any support for

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115; 24 Delaware Code, § 106; Florida Statutes, § 473.322; Kansas Statutes Ann., § 1-316; Louisiana Revised Statutes, § 37:77; Maine Revised Statutes, § 12275; Minnesota Statutes, § 326.21; Mississippi Code Ann., § 73-33-13; New York Consolidated Laws, Education § 7408; North Carolina General Statutes, § 93-3; Wisconsin Statutes, § 442.11; and Wyoming Statutes, § 33-3-126. Finally, a number of state courts besides Maryland have held that use of the generic terms accountant or accounting cannot be reserved exclusively for licensees. (See cases cited in Mosk Dissenting Opinion at Appendix p. 30.) Thus, a significant number of states either reject or fail to recognize the potential problem of public confusion (over the status of unlicensed persons using the generic terms) which the California Supreme Court has reached so far to "solve" in this case.

such an approach. Apparently based upon Justice White's dissent in *Peel*, the California Supreme court has made an even more drastic departure from established commercial speech doctrine by assuming the power to fashion and impose its own disclaimer remedy, *sua sponte*, with the force and effect of new legislation.

The errors of the majority opinion and its conflict with decisions of this court may seem apparent. However, the fact that it carries the imprimatur of the highest court in California, coupled with the formative state of the law in this area, poses an unacceptable risk that it will be followed — not only by all courts in California, but by other state and federal courts as well. That risk is compounded by the fact that it is relatively easy for creative judges or counsel to imagine at least a *potential* for public confusion in virtually any commercial speech. It is equally easy to conceive some affirmative disclosure requirement to address any presumed public confusion. Yet if the approach of California's Supreme Court is adopted, it will undermine the entire constitutional edifice constructed by this Court to protect commercial speech. That construct requires the State in the first instance to give adequate notice of any restraint it proposes to place upon commercial speech, then to satisfy its burden of proving such a restraint is necessary and appropriate in a proceeding where the party whose speech is to be restrained has had an opportunity to be heard and present opposing evidence. Without those safeguards, the constitutional guarantee of freedom for commercial speech will become an illusion, subject to the whims of any appellate court too impatient to wait for legislative or regulatory action addressing what it perceives to be some risk of public confusion.

## II.

## THE DECISION OF THE CALIFORNIA SUPREME COURT RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

Although the decision of the California Supreme Court is in direct conflict with the basic principles underlying all prior deci-

sions on commercial speech, this Court has never faced the specific question posed by the decision below — may an appellate court acting *sua sponte* fashion a less restrictive alternative limitation upon potentially misleading commercial speech in response to an unconstitutional absolute ban without any statutory basis and without giving the parties any opportunity to present evidence on the propriety of that new limitation? Unless certiorari is granted, the sole authority addressing that issue will be the majority opinion in this case. Only this Court can finally settle the important questions of federal constitutional law raised by that decision.

As noted in Justice Mosk's dissent, a handful of state courts have addressed the broader issue of whether non-licensed accountants have an absolute right to use the generic terms without qualification. All but one intermediate appellate court in Texas has upheld that right. (See Appendix, p. 30.) However, most of those cases are more than twenty years old. Therefore, only the *Comprehensive* case based its decision upon constitutional protections for commercial speech. In the vast majority of states where licensed and non-licensed accountants compete as providers of basic accounting services which do not require the specialized audit expertise of a CPA, licensee-dominated accountancy boards can be expected to take advantage of the decision below as an opportunity to shackle their competition with the confusing and demeaning epithet "unlicensed accountant." This Court cannot impose uniformity upon all state regulation of the accounting profession, but only this Court can ensure that the same principles are applied whenever State restraints upon professional advertising are tested against constitutional free speech standards.

The fact that the regulation at issue was promulgated by a licensee-dominated state agency bent upon curtailing competition from non-licensees raises another important federal question which should be settled by this Court. Justice Mosk addressed that issue in his dissent:

> "Furthermore, Regulation 2 is itself of questionable validity. In 1948, at the time it was adopted, the Board consisted entirely of licensed accountants. (Citation.) The membership of the Board . . . presently . . . consists of 12 persons, 8 of

> them accounting professionals licensed by the state, and 4 public members. (Citation.) None of the members of the Board . . . is an unlicensed person performing accounting work . . . . The Board majority has an obvious pecuniary interest in preventing those without a license from advertising to the public that they are performing accounting services. Regulation 2 furthers that interest. The law has long looked with disfavor on rules adopted by a regulatory body the majority of which consists of members of a profession with a pecuniary stake in restricting the rights of competitors. (Citations.)" (Appendix, p 31.)

In *Gibson* v. *Berryhill* (1973) 411 U.S. 564, this court held that the pecuniary self-interest of licensed optometrists on the Alabama Board of Optometry raised due process considerations which precluded them from initiating valid proceedings against competing optometrists. This Court should resolve any doubt about whether the due process principles applied in *Gibson* also preclude the licensee-dominated State Board of Accountancy from issuing a valid regulation aimed at restraining competition between licensees and non-licensees. It can do so by granting the petition for certiorari in this case, then reversing the California Supreme Court decision which upholds the State Board's regulation in modified form and thereby preserves its anti-competitive character.

## CONCLUSION

The majority opinion of the California Supreme Court pays lip service to the constitutional principles applied by this Court to similar blanket restraints upon commercial speech and by the highest court of Maryland in an identical case. But the California Supreme Court has refused to follow those principles and thereby placed itself in conflict with this Court and Maryland's highest court. As a result, petitioners have been deprived of their constitutional right to engage in accurate and truthful commercial speech free of any restraint in the absence of: (1) notice of a specific restraint imposed by statute or regulation; and (2) adequate evidence establishing that restraint is appropriate and necessary in a proceeding where the party whose speech is to be restrained has

had an opportunity to cross-examine and present opposing evidence. The California Supreme Court's assertion of judicial power to *sua sponte* pare down an admittedly unconstitutional restraint to whatever a majority of that court believes is a reasonable limit — without regard for record evidence or the opposition of both parties — is a dangerous precedent which threatens to undermine the free speech protections carefully constructed by this Court.

For each of the reasons stated herein, this Court should grant a petition for certiorari in order to review and reverse the decision of the California Supreme Court.

Dated: November 20, 1992.

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*Defendant, Cross-complainant and Respondent.*

(FILED JULY 2, 1992)
SO 17399
(Ct. of Appeal No. A046279)
(Super. Ct. No. 863037)

We granted review in this case to determine whether persons *unlicensed* by the State Board of Accountancy (Board), the public agency charged with administering the regulatory scheme governing the profession of public accountancy in California (Bus. & Prof. Code, § 5000[1] et seq., commonly known as the Accountancy Act), may hold themselves out to the public as "accountants," or as persons qualified and lawfully able to offer "accounting" services for compensation.

As will be shown, under California's regulatory scheme, accounting activities falling within the statutory definition of the "practice of public accountancy" are reserved to the Board's licensees. "Public accountancy" is broadly defined; a person is deemed to be practicing public accountancy, and is thus subject to the jurisdiction and licensing requirements of the Board, if the person does any of the following: "[h]olds himself or herself out to the public *in any manner* as one skilled in the knowledge, science and practice of accounting, and as qualified and ready to render professional service therein as a public accountant for compensation" (§ 5051, subd. (a), italics added); "[o]ffers to prospective clients to perform for compensation . . . professional

[1]All further statutory references are to the Business and Professions Code unless otherwise indicated.

services that involve or require an audit, examination, verification, investigation, certification, presentation, or review, of financial transactions and accounting records" (id., subd. (c)); or "[i]n general or as an incident to that work, renders professional services to clients for compensation *in any or all matters relating to accounting procedure* and to the recording, presentation, or certification of financial information or data (*id.*, subd. (e), italics added).

In contrast, unlicensed persons may offer to the public only a limited category of basic accounting services when performed "as a part of bookkeeping operations." (§§ 5051, subd. (f), 5052.) Furthermore, they may not assume or use any title or designation "likely to be confused" with the two official titles reserved for licensed accountants: "certified public accountant" and "public accountant." (§ 5058.) Exercising the rulemaking authority granted to it in the Accountancy Act, the Board has adopted a regulation which prohibits the use of either the title "accountant" or the description of services offered as "accounting" by an unlicensed person. (Cal. Code of Reg., tit. 16, sec. 2 [hereafter Regulation 2].) Appellants contend that in so doing the Board exceeded its authority, that the regulation is therefore invalid, and that even if the regulation is permissible under section 5058, the restriction denies them rights under the First Amendment to the United States Constitution.

California's statutory scheme reserves the practice of public accountancy to the Board's licensees — persons who have been certified as qualified to offer and perform the full gamut of accounting services, and whose educational, experience, and ethical qualifications have been established as a prerequisite to licensing. To protect members of the public from the unlicensed practice of public accountancy, section 5058 prohibits the use by an unlicensed person of any designation or term describing the person's profession, or services he or she offers, that is likely to cause a layperson to believe that the provider is licensed. Thus, the section expressly prohibits the use by an unlicensed person of any designation that is "likely to be confused with 'certified public accountant' or 'public accountant.' "

The Board has determined that the terms "accountant" and "accounting" are misleading to members of the public, many of whom believe that a person who uses these terms must be licensed. For the reasons explained below, we conclude that the adoption and enforcement of Regulation 2 is a proper exercise of the Board's authority to administer the Accountancy Act, and, in particular, section 5058. We further conclude, however, that the regulatory scheme may constitutionally ban only those uses of the terms "accountant" and "accounting" that may potentially mislead the public regarding the user's licensee or nonlicensee status. Where the terms are used in conjunction with a modifier or modifiers that serve to dispel any possibility of confusion — for example, an express disclaimer stating that the "accounting" services being offered do not require a state license — their use in such a context may not be constitutionally enjoined.

## I

*Facts and Procedural Background*

In 1986, appellants Bonnie Moore, an unlicensed individual, Accounting Center, a California corporation of which Moore is president, and the California Association of Independent Accountants (CAIA), a nonprofit membership organization affiliated with the National Society of Public Accountants (NSPA), collectively filed suit against respondent Board for declaratory relief and a permanent injunction. (Code Civ. Proc., § 1060.) The complaint alleged that Moore had received a letter from the Board ordering her and Accounting Center to cease and desist from using the terms "accountant" and "accounting" in referring to herself, the business of Accounting Center, or the services she offered to the public. The complaint further alleged that resolution of the question of whether the Board may constitutionally prohibit use of generic terms such as "accountant" and "accounting" by unlicensed individuals will affect thousands of other unlicensed persons practicing throughout the state of California. At that time approximately 700 such individuals were members of CAIA, and the officers and directors of CAIA joined the lawsuit to challenge the Board's actions on behalf of CAIA's membership. The complaint sought a declaratory judgment that the Board

may not constitutionally enjoin or prohibit appellants or members of CAIA from using the terms "accountant" and "accounting" in referring to unlicensed persons or the services rendered by them, and a permanent injunction ordering the Board to cease all enforcement actions against the use of those terms.

After its demurrer to the complaint was overruled, respondent Board filed an answer and a cross-complaint for injunctive relief against the named plaintiffs plus 2,000 Doe defendants. Does 1 through 1,000 were designated California members of CAIA, and Does 1,001 through 2,000 were designated as individuals who "have transacted and continue to transact business in the County of San Francisco and elsewhere in the State of California." The cross-complaint alleged that the cross-defendants were engaged in the practice of public accountancy and of tax preparation within California, yet were not licensed as public accountants or certified public accountants. The first amended cross-complaint prayed in part that cross-defendants be enjoined from using the words "accountant," "accounting," or "accounting services" in referring to themselves or their businesses, or representing themselves as "accountants" in any other manner which would tend to mislead or confuse the public.

During the ensuing court trial, evidence was introduced establishing that Moore possesses a college degree with a major in accounting. She has never taken the examination to become a certified public accountant (CPA), nor is she interested in doing so. Respondent Board concedes she meets the educational eligibility requirements for the CPA examination, but not the experience requirement for licensure. As a practical matter, in order to satisfy the latter requirement — two years of public accounting experience under the supervision of a licensed accountant (§§ 5081.1, 5083) — she would have to secure employment with a CPA for at least two years.

Accounting Center primarily designs and installs basic accounting systems for small business clients. Once the system is set up, bookkeepers service the accounts, supervised by degreed accountants. The firm prepares monthly financial statements and long-range financial projections for its clients in furtherance of budgetary control and sound financial management practices. In a

generic sense, the firm "audits" its client's books for internal purposes, although it does not produce formal signed audits. Moore conceded she is not qualified to perform the type of formal audits that a CPA does, nor is she qualified to perform services that require a certification of financial statements.

Moore uses the terms "accountant" and "accounting" to describe herself and her services in 90 percent of her advertising. She refers to her business on building directories, in the telephone directory, and in radio and television advertising as "Accounting Center."

Like Moore, none of the various officers or members of CAIA who testified at trial have ever passed the CPA examination. Ronald Duffin, a former president of CAIA, operates an accounting and tax service. Edwin Greenstreet, another former president of CAIA, operates a tax, accounting and bookkeeping business. John Jenkins, president-elect of CAIA at the time of trial, owns a bookkeeping and income tax business. Among other services, he prepares reports that are filed with various governmental agencies, and signs the reports as "John Jenkins, Accountant."

In January 1987, after respondent Board had unsuccessfully demurred to appellants' complaint and filed its answer, the Board, through its counsel, the Office of the California Attorney General, contacted the Field Research Corporation, an independent opinion research firm that conducts the California Poll, an ongoing survey of Californians that attempts to measure public attitudes on various unrelated topics. All results from the polls are made public. The Attorney General sought to determine the public's perception of whether a person is licensed by the State of California when that person holds himself or herself out as an "accountant" ready and able to offer "accounting services." To this end, the following two questions were included in the April 1987 California Poll: (1) "Do you think that persons who refer to themselves as accountants in advertising to the public are required to be licensed by the State of California?," and (2) "Do you think persons who advertise accounting services to the public are required to be licensed by the State of California to offer such services?"

The results of the poll with respect to the first question indicated that 55 percent of those surveyed believed that a person who advertised as an "accountant" had to be licensed, 26 percent did not believe a license was required, and 19 percent did not know. The results of the second question indicated that 53 percent believed that a person who advertised "accounting services" to the public was required to be licensed by the state, 29 percent did not believe a license was required, and 18 percent did not know.

Appellants introduced expert testimony in an effort to establish the ordinary meaning and usage of the terms "accountant," "accounting," and "bookkeeping." Dr. Maurice Moonitz, Accounting Professor Emeritus at the University of California, testified that over the years "double entry bookkeeping," a "fairly simple recording technology" by which business transactions are recorded, evolved into the field now commonly known as accounting. Today, according to Moonitz, the accounting profession, which he characterizes as the "umbrella term," has absorbed the basic recording or bookkeeping functions which, in years past, were performed by "bookkeepers." Traditionally, the bookkeeper would identify the transactions that are taking place, and then record the transactions according to a "predesigned pattern" or system of recordation. Today, the accountant "would probably be the one who designed the system in the first place," and "would take over the financial statements, preparation of those, because then those would need analysis so that the accountant could inform management of the meaning of what took place during the year."

At the completion of trial, the court entered judgment denying relief to appellants, and granting respondent Board's request for a permanent injunction enjoining appellants from "[u]sing the words 'accountant,' 'accounting,' or 'accounting services' in referring to themselves, their businesses or their services in the context of holding themselves out to the public in the offering or rendering of professional services, or representing themselves as 'accountants' in any other manner which would tend to mislead or confuse the public."

This appeal followed. The Court of Appeal, relying in part on the only California case to have considered whether use of the

terms at issue here may be banned — *People* v. *Hill* (1977) 66 Cal.App.3d 320 (Hill) — concluded the statutory scheme prohibited an unlicensed person from holding himself or herself out to the public as an "accountant," or as a person otherwise qualified to provide "accounting services" for compensation. Crediting the California Poll survey evidence introduced by respondent Board, the Court of Appeal found that "the terms 'accountant' and 'accounting,' standing alone, are misleading to the public and may not be utilized by unlicensed persons."

The Court of Appeal went on to observe that the *Hill* court (*supra*, 66 Cal.App.3d 320), in upholding the preliminary injunction before it in that case, did not reach or consider the constitutional limitations called into play by the United States Supreme Court's commercial speech decisions of the past decade. The Court of Appeal therefore proceeded to reach the constitutional issue, concluding that the high court's commercial speech cases "make it clear that to satisfy the First Amendment, we must permit the use of [the generic terms] if they are qualified by a warning or disclaimer that avoids their misleading impact." The Court of Appeal concluded, "While we do not intend to dictate the language which would be acceptable, it is obvious that the term 'unlicensed accountant,' for instance, is not misleading. Thus, the judgment and injunction in this case must be modified to prohibit only the use of the terms 'accountant' or 'accounting' without a modifier, qualifier, disclaimer, or warning stating either that the advertiser is not licensed by the state or that the services provided do not require a state license."

Appellants urge this court to reverse the Court of Appeal decision. They contend that the key statute, section 5058, neither expressly nor implicitly prohibits an unlicensed person from using the unqualified generic terms. To the extent *Hill*, *supra*, 66 Cal.App.3d 320, held that the Accountancy Act permits such a prohibition, appellants urge that it was wrongly decided and should be disapproved. Appellants further contend that Regulation 2, the Board's administrative regulation implementing section 5058 by prohibiting any use of the terms "accountant" or "accounting" by unlicensed persons, improperly expands the scope of that statute and should therefore be declared invalid. It is asserted

that if unlicensed persons can lawfully offer basic "accounting" services to the public under the State's regulatory scheme, then such persons' use of the generic terms "accountant" or "accounting" in holding themselves out to the public is constitutionally protected commercial speech, and consequently, the Board's *blanket prohibition upon their use* of the generic terms imposes an unconstitutional restraint on their First Amendment rights.

Appellants further contend that the California Poll survey evidence introduced by respondent below established, at best, only that use of the generic terms "accountant" or "accounting" by unlicensed individuals is *potentially* misleading to the public. Although appellants *concede* that a state may implement a less restrictive alternative than an outright ban in order to remedy the harmful effects on the public of potentially misleading professional advertising, they urge that such is a legislative prerogative, that California's Legislature has never implemented any such regulation, and that a court may not "rewrite" a statute absent clear legislative intent.[2]

Respondent in turn argues *Hill* was correctly decided and should be deemed controlling here, i.e., that the use of the terms "accountant" or "accounting," whether qualified or standing alone, by unlicensed persons offering their services to the public for compensation, is statutorily prohibited. In particular, respondent points to the language of section 5058 that prohibits unlicensed persons from using *any* title or designation "likely to be confused" with the two official terms denoting licensure ("certified public accountant" and "public accountant"). The generic terms "accountant" and "accounting," respondent asserts, are titles "likely to be confused" with those official terms, and are thus subject to section 5058's prohibition.

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[2]The Center for Public Interest Law, the NSPA, and the California Society of Enrolled Agents, have each filed amicus curiae briefs in support of the position taken by appellants. In addition, this court is in receipt of numerous letters in support of appellants from unlicensed individuals and businesses that practice bookkeeping and offer basic accounting and tax preparation services to the public.

Respondent contends the Accountancy Act, thusly construed, passes constitutional muster. Relying on the California Poll survey evidence which, respondent claims, established that an unlicensed person's use of the generic terms in fact misleads the public, respondent concludes the use of such titles constitutes misleading advertising that is not subject to First Amendment protection, and may be banned entirely by the state. (See *In re R. M. J.* (1981) 455 U.S. 191, 203.)

II

At the threshold, it is undisputed that the Legislature, in the public interest and in furtherance of the general welfare, is empowered to regulate the profession of public accountancy. (See, e.q., 1 Am.Jur.2d, *Accountants* (1962) § 2.) California's first entry into the regulation of the profession came in 1901, when the Legislature established a five-member State Board of Accountancy, and vested in it the power to examine applicants, and grant certificates of qualification to practice public accountancy. (Stats. 1901, ch. 213, p. 645.) The regulatory scheme underwent a major revision in 1945, and the Board was expanded to seven members. (Stats. 1945, ch. 1353, § 2, pp. 2529-2545.) Presently, the Board consists of 12 members, 8 of them state-licensed accountants, and 4 public members. (§ 5000.) It is empowered, among other things, to adopt regulations as may be reasonably necessary to administer the Accountancy Act (§ 5010), and to adopt rules of professional conduct governing its licensees. (§ 5018.) The Board is also authorized to seek injunctions against persons who have engaged or are about to engage in conduct or practices which violate the Accountancy Act. (§ 5122.)

Under the present California licensing scheme, certified public accountants must satisfy rigorous educational, experience, and examination requirements prior to obtaining licensure. Applicants must take and pass a written examination in accounting theory and practice, auditing, commercial law as affecting accountancy, and other related subjects. (§ 5082.) They may be denied a license (or a licensee's license may be suspended or revoked, or renewal of a license refused) if they have committed certain

crimes, committed an act of fraud or dishonesty, or done other specified acts which would be cause for discipline by the Board. (§§ 480, 5081, 5100.) The Board's licensees must adhere to professional standards and continuing education requirements in order to maintain licensure; noncompliance with such professional standards or other licensure requirements can lead to suspension, revocation, or refusal to renew a license. (§ 5100.)

In contrast, the Board's enforcement activities against *unlicensed persons* engaged in the practice of public accountancy are limited to responding to those consumer complaints over which it has jurisdiction. It has jurisdiction over complaints involving unlicensed persons holding themselves out to the public as licensed accountants. It has no jurisdiction over complaints involving the quality of "accounting" work or services performed by nonlicensees. Section 5050 provides that "No person shall engage in the practice of public accountancy in this State unless such person is the holder of a valid permit to practice public accountancy issued by the board[.]" According to the testimony of the executive officer of the Board, violators of section 5050 may be referred to the Division of Investigation, a state agency, for investigation and possible referral to the local district attorney's office for civil or criminal prosecution, but the Board itself is not empowered to "prosecute" unlicensed persons for the unlawful practice of public accountancy.

Accordingly, for purposes of our analysis herein, the term "unlicensed person" includes *any* person who does not hold a valid permit issued by the Board to practice public accountancy. It includes persons, like appellant Bonnie Moore, who, the Board concedes, can meet the educational eligibility requirements for the CPA examination but not the experience requirement for licensure. It would also include persons without any formal educational background or experience in the accounting profession whatsoever, who nonetheless attempt to seek compensation from members of the public for the rendering of "accounting" services. And it would include a former Board licensee who, due to a breach of professional ethics or the commission of a crime or act of fraud or dishonesty, has had his or her license revoked by the Board. All such persons, although unlicensed, may nonethe-

less seek to offer to the public for compensation a limited category of basic accounting services "as a part of *bookkeeping operations*." (§ 5051, subd. (f), italics added; § 5052.)[3]

With this background in mind, we turn to the principal statute at issue in this case, section 5058. Section 5058 provides, in pertinent part: "No person or partnership shall assume or use the title or designation 'chartered accountant,' 'certified accountant,' 'enrolled accountant,' 'registered accountant' or 'licensed accountant,' or any other title or designation likely to be confused with 'certified public accountant' or 'public accountant,' or any of the abbreviations 'C.A.,' 'E.A.,' 'R.A.,' or 'L.A.,' or similar abbreviations likely to be confused with 'C.P.A.' or 'P.A.'..."[4]

Appellants urge us to invoke the principle of statutory construction known by the Latin names *ejusdem generis* and *noscitur a sociis*; that when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. (See *People* v. *Rogers* (1971) 5 Cal.3d 129, 142 [conc. & dis. opn. of Mosk, J.]; *Armenta* v. *Churchill* (1954) 42 Cal.2d 448, 454; *People* v. *Thomas* (1945) 25 Cal.2d 880, 899-900; *Treasure I.C. Co.* v. *St. Bd. of Equal.* (1941) 19 Cal.2d 181, 188; see generally, 2A Sutherland, Statutory Construction (4th ed. 1984) §§ 47.16-47.22, pp. 161-193.) In accordance with this principle of construction, a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list

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[3]Section 5052, commonly referred to as the "bookkeeping exception," provides: "Nothing in this chapter shall apply to any person who as an employee, independent contractor, or otherwise, contracts with one or more persons, organizations, or entities, for the purpose of keeping books, making trial balances, statements, making audits or preparing reports, *all as a part of bookkeeping operations*, provided that such trial balances, statements, or reports are not issued over the name of such person as having been prepared or examined by a certified public accountant or public accountant." (Italics added.)

[4]The above quoted portion of section 5058 is identical to the text of its 1945 predecessor statute (former § 5065).

unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list. (See *Harris* v. *Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159-1160; *Peralta Community College Dist.* v. *Fair Employment Housing Com.* (1990) 52 Cal.3d 40, 50; *Dyna-Med. Inc.* v. *Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1390-1391.)

Appellants point to the fact that section 5058 contains a list of titles that, the Legislature has determined, are designations "likely to be confused" with the two titles reserved to Board-licensed accountants: "certified public accountant" and "public accountant." Each of the five expressly prohibited titles is comprised of the generic term "accountant" coupled with a modifier. Appellants urge that if the Legislature deemed the unadorned generic term "accountant" a title "likely to be confused" by the public with the two official designations denoting licensure, its unmodified use would have been expressly prohibited in section 5058.

Respondent urges us to instead focus on section 5058's catchall language prohibiting an unlicensed person's use of "any other title or designation likely to be confused with [the two official terms denoting licensure]...." The generic terms "accountant" and "accounting" services are two such confusing designations, argues respondent, and thus the statute should be construed to include the use of the unadorned generic terms within the statutory ban.

In construing a statute a court's objective is to ascertain and effectuate the underlying legislative intent. (*People* v. *Woodhead* (1987) 43 Cal.3d 1002, 1007.) This fundamental rule overrides the *ejusdem generis* doctrine, just as it would any maxim of jurisprudence, if application of the doctrine or maxim would frustrate the intent underlying the statute. (Civ. Code, § 3509; *Larcher* v. *Wanless* (1976) 18 Cal.3d 646, 658; *Irwin* v. *City of Manhattan Beach* (1966) 65 Cal.2d 13, 21; *In re La Societe Francaise etc.* (1899) 123 Cal. 525, 530-531; *Worthington* v. *Unemployment Ins. Appeals Bd.* (1976) 64 Cal.App.3d 384, 388; *Coleman* v. *City of Oakland* (1930) 110 Cal.App. 715.)

We are not persuaded that the approach of either party is consistent with the legislative intent reflected in section 5058.

Application of the doctrine of *ejusdem generis* would be inappropriate in this context. The Legislature used all-encompassing language in banning not only the expressly identified designations but also "*any other* title or designation that is likely to be confused with 'certified public accountant' or 'public accountant.' " (§ 5058, emphasis added.) Appellants' construction of section 5058 would require us to assume that notwithstanding that broad prohibition of potentially confusing titles, use of the unmodified terms "accountant" and "accounting" was permissible regardless of whether that use was then or proved at some later date to be "likely confused with" licensed status, i.e., that use of those terms was to be permitted no matter how misleading they were. That construction cannot be reconciled with the clear purpose of the statute — ensuring that members of the public who seek the services of a licensed accountant are not misled regarding the status of the person who provides accounting services.

We agree with appellants, however, that section 5058 does not itself expressly prohibit the use of the unmodified terms "accountant" and "accounting." To read the section in that manner would render the identification of the specific terms which were banned surplusage, since the ban on "any . . . title or designation likely to be confused with 'certified public accountant' or 'public accountant' " encompasses those terms. The Legislature therefore had some other purpose for both identifying specific terms that are not to be used and banning other potentially misleading designations that it did not identify. Since that purpose could not have been to permit the use of misleading terms, it is reasonable to conclude that when the statute was amended in 1945 the Legislature was aware that the titles or designations it specifically identified were or had been in use and were misleading. Recognizing that other terms it had not then identified as misleading could be so, or might become misleading in the future, however, the Legislature made provision for that possibility by prohibiting the use of "any" misleading term.

Inasmuch as enforcement of the provisions of the Accountancy Act, including section 5058, is entrusted to the Board, it seems apparent that the Legislature delegated to the Board the authority

to determine whether a title or designation not identified in the statute is likely to confuse or mislead the public. Since the Board was also authorized to seek an injunction against the use of such terms, its authority to "adopt, repeal, or amend such regulations as may be reasonably necessary and expedient for the . . . administration of [the Accountancy Act]" (§ 5010) includes the power to identify by regulation those terms which it finds are "likely to be confused with 'certified public accountant' or 'public accountant,'" the use of which may be enjoined under the broad prohibition of section 5058. To conclude otherwise would contravene the intent and purpose behind the statute.

In 1948, the Board exercised its authority to identify other potentially misleading designations that were subject to the catch-all prohibition of what was then section 5065 (the predecessor statute to § 5058, identical in all respects relevant here) by the adoption of Regulation 2, which provides:

> "§ 2 *Confusing Titles*
>
> "The following are titles or designations likely to be confused with the titles Certified Public Accountant and Public Accountant within the meaning of Section 5058 of the Business and Professions Code:
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> "(a) 'Accountant,' 'auditor,' 'accounting,'or 'auditing,' when used either singly or collectively or in conjunction with other titles.
>
> "(b) Any other titles or designations which imply that the individual is engaged in the practice of public accountancy."

In considering whether Regulation 2 is a valid exercise of the Board's power to adopt regulations necessary for the administration of the Accountancy Act, and in particular section 5058,[5] 'our task is to inquire into the legality of the . . . regulation, not its

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[5]The Board's Regulation 2 was placed in issue in this case through the parties' pleadings in the trial court. Appellants alleged in their complaint for declaratory relief that, "The Board has taken the position that any use of the terms 'accountant' or 'accounting' by a non-licensed accountant is a violation of Business and Professions Code Section 5058. . . ."

wisdom. (*Morris* v. *Williams* (1967) 67 Cal.2d 733, 737.) . . . [I]n reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is 'within the scope of the authority conferred' ([former] Gov. Code, § 11373 [see current Gov. Code § 11342.1]) and (2) is 'reasonably necessary to effectuate the purpose of the statute' ([former] Gov. Code, § 11374 [see current Gov. Code § 11342.2]). [Fn. omitted.] Moreover, 'these issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with the strong presumption of regularity accorded administrative rules and regulations.' (*Ralph's Grocery Co.* v. *Reimel* (1968) 69 Cal.2d 172, 175.) And in considering whether the regulation is 'reasonably necessary' under the foregoing standards, the court will defer to the agency's expertise and will not 'superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision.' (*Pitts* v. *Perluss* (1962) 58 Cal.2d 824, 832.)" (*Agricultural Labor Relations Bd.* v. *Superior Court* (1976) 16 Cal.3d 392, 411.)

The promulgation of Regulation 2, which implements the catchall language of section 5058, appears well within the authority conferred on the Board by the Legislature to "adopt . . . such regulations as may be reasonably necessary and expedient for the . . . administration of [the Accountancy Act]." (§ 5010.) Furthermore, Regulation 2's declaration — that the generic terms "accountant" and "accounting" are themselves titles or designations likely to be confused with "certified public accountant" and "public accountant" — appears reasonably necessary to effectuate

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Respondent Board countered the allegation in its answer as follows: "[D]efendant admits that the Board has taken the position, based on statutory and case law, that unlicensed persons may not legally use the terms 'accounting' or 'accountant' in describing themselves or their services . . . . Further answering [the allegation,] defendant affirmatively alleges that the Board has duly adopted and filed a regulation (Title 16, California [Code of Regulations,] section 2(a)) stating that the terms 'accountant,' 'auditor,' 'accounting,' or 'auditing' are titles or designations likely to be confused with the titles Certified Public Accountant and Public Accountant within the meaning of Business and Professions Code section 5058."

the purpose and intent behind section 5058: the protection of the public from the unlicensed practice of public accountancy through the elimination of any likelihood of confusion from the use of potentially misleading or confusing titles. The results of the California Poll survey evidence introduced in this case tend to bear this out.

The following two questions were asked of those responding to the poll: (1) "Do you think that persons who refer to themselves as accountants in advertising to the public are required to be licensed by the State of California?," and (2) "Do you think persons who advertise accounting services to the public are required to be licensed by the State of California to offer such services?"

The results of the poll with respect to the first question indicated that 55 percent of those surveyed believed a person who advertised as an "accountant" had to be licensed, 26 percent did not believe a license was required, and 19 percent did not know. The results of the second question indicated that 53 percent believed that a person who advertised "accounting services" to the public was required to be licensed by the state, 29 percent did not believe a license was required, and 18 percent did not know.

The survey responses, at the very least, support the inference that members of the public who believe that licensing is required would assume that a person who uses the title "accountant" and the designation "accounting" to describe the services offered is licensed by the state.[6]

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[6]We do not, in this regard, mean to suggest that the response to a public opinion poll is itself an appropriate basis for "deciding an issue of statutory construction." (See dis. opn. at pp. 12-13, and fn. 7]; dis. opn. of Mosk, J., *post*, at p. _____-_____, and fn. 7 [typed dis. opn. at pp. 12-13, and fn. 7]; dis. opn. of Mosk, J., *post*, at p. _____ [typed dis. opn. at p. 5].) Obviously, the Legislature did not have the results of this opinion poll before it upon enacting section 5058. What must be determined is whether the Board could reasonably conclude that use of the unmodified terms "accountant and accounting services," as a factual matter, is misleading or potentially misleading to the public's detriment, and if so, whether the Legislature nonetheless intended to exclude those terms

In a somewhat analogous context — attorney advertising — it has been observed that special considerations apply to advertising by professionals: "[I]t has been noted that special considerations apply to advertising by lawyers because they 'do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.' (*Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748,

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from the scope of the prohibitory catchall language when it enumerated a list of specifically prohibited titles which utilize the term "accountant" in conjunction with modifiers.

The survey evidence introduced below merely informs us as to the first, factual inquiry. By analogy, in change of venue cases, survey evidence is often admitted as probative of the determination whether prevailing community attitudes warrant a change of venue. (See, e.g., *Frazier* v. *Superior Court* (1971) 5 Cal.3d 287, 293-94, fn. 6; see also *James Burrough Ltd.* v. *Sign of Beefeater, Inc.* (7th Cir. 1976) 540 F.2d 266, 277-278 [results of plaintiff-distiller's face-to-face survey of 500 households admissible in trademark infringement action to establish "likelihood of confusion, deception or mistake" among consuming public regarding defendant's use of plaintiff's registered "beefeater" mark].) Indeed, at trial respondent introduced evidence of a similar poll taken in Texas in 1985. In the Texas poll, 62 percent of those responding to the survey answered "yes" when asked whether people who advertise as "accountants" are required to be licensed by the State of Texas; 19 percent said "no"; and 19 percent did not know. Michael Hagen, a specialist in the analysis of public opinion research data, testified that in his opinion the data from the Texas poll could inform the conclusions to be drawn from the California poll because of the similarity of responses to comparable questions and the similarity of certain demographic factors in each of the surveys. Based on his review and analysis of the data from the California and Texas polls, Hagen concluded that a majority of Californians believe persons who advertise as "accountants" are required to hold at least a college degree, take a qualifying examination, and be licensed by the state.

We also note that, at oral argument, regarding the circumstance of licensed and unlicensed persons alike using the title "accountant," counsel for appellants readily acknowledged, "There is a possibility that the public might be misled."

773, fn. 25.) This court analyzed the above quoted language in *Jacoby* v. *State Bar* (1977) 19 Cal.3d 359. Writing for the court, Justice Mosk explained that the footnote 'stands for the proposition that while the First Amendment values in commercial advertising remain constant regardless of the profession involved, the governmental regulatory interest may vary from profession to profession.' (Id., at p. 377.)" (*Leoni* v. *State Bar* (1985) 39 Cal.3d 609, 625.)

As the court in *Texas State Board of Public Accountancy* v. *Fulcher* (Tex.Civ.App. 1974) 515 S.W.2d 950 observed nearly two decades ago: "[T]he need to protect the public against fraud, deception [and] the consequences of ignorance or incompetence in the practice of most professions makes regulation necessary. The state may exact the requisite degree of skill and learning in professions which affect the public, or at least a substantial portion of the public, such as the practice of law, medicine, engineering, dentistry, and many others. The [accountancy] Act before us recognizes public accountancy as one of such professions. Public accountancy now embraces many intricate and technical matters dealing with many kinds of tax laws, unfair trade practices, rate regulations, stock exchange regulations, reports required by many governmental agencies, financial statements and the like." (Id., at pp. 954-955.)

These observations apply with even more force to the practice of the profession of public accountancy in the 1990's. We conclude that the Board's determination, embodied in Regulation 2, that the terms "accountant" and "accounting" are titles or designations likely to be confused with the official titles denoting licensure, is consistent with the intent and purpose behind section 5058 and the provisions of the related statutes, and is "reasonably necessary" to effectuate the purpose and intent underlying the legislation. (*Pitts* v. *Perluss* (1962) 58 Cal.2d at p. 832.)

As further evidence that Regulation 2 is consistent with the legislative intent behind section 5058, it is significant that in the nearly half a century since the Board adopted the regulation, shortly after enactment of the statutory provision, the Legislature has not sought to amend section 5058 to defeat the Board's

interpretation of the scope of its authority under section 5058. Although the Legislature twice amended section 5058, first in 1959 (Stats. 1959, ch. 310, § 42, p. 2228) and again in 1979 (Stats. 1979, ch. 25, § 1, p. 70), the substantive provisions with which we are here concerned have remained *unchanged* in the 44 years since the Board adopted Regulation 2. In this regard, a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it. (*Robinson* v. *Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 235, fn. 7; *El Dorado Oil Works* v. *McColgan* (1950) 34 Cal.2d 731, 739.)

Such a presumption should also be applied on a showing that the construction or practice of the agency has been made known to the Legislature. (*Robinson* v. *Fair Employment & Housing Com., supra,* 2 Cal.4th at p. 235, fn. 7; *Pacific Greyhound Lines* v. *Johnson* (1942) 54 Cal.App.2d 297, 303.) To this end we note that in 1965, an assemblyman from the Third Assembly District requested an opinion from the California Attorney General as to whether a member of the public, who is not licensed as a certified public accountant or public accountant to practice accounting in California, is in violation of the Accountancy Act when he or she uses the word "accounting" on a building directory or on an office door. The Attorney General's conclusion was that: "The use of the word 'accounting' on a building directory and an office door by an unlicensed individual is a representation to the public that such individual is skilled in accounting and that the user is qualified and ready to perform professional services. Such a representation by an unlicensed individual is in violation of the Accountancy Act . . ." (46 Ops.Cal.Atty.Gen. 140, 141 (1965).)

Finally, the Legislature may also be presumed to have been aware of the decision filed in 1977 in *Hill, supra,* 66 Cal.App.3d 320, the only published California case to have addressed the right of an unlicensed person to use the terms in issue here. The *Hill* court concluded that use of a business name "A-Accounting — Jack M. Hill & Co." violated section 5050, and affirmed an order *granting* a preliminary injunction against use of the words

"accountant" and "accounting" by the defendant in conjunction with his business title.

Section 5050 prohibits the practice of public accountancy by an unlicensed person. The *Hill* court reasoned that by use of the name in issue the defendant was holding himself out to the public as being engaged in the provision of professional accounting services. That conduct constituted the practice of public accountancy as defined in section 5051. "[T]he use of the title 'A-Accounting' like the use of the word 'accounting' on the building directory and office door can only be interpreted to mean that he is representing to the public that he is skilled in the practice of accounting and is qualified and ready to provide accounting services to the public, a representation that an unlicensed person is prohibited from doing." (*Hill, supra*, 66 Cal.App.3d at 329.)

The *Hill* court recognized that an unlicensed person is permitted by law to offer certain basic accounting services to the public for compensation *when offered in connection with bookkeeping operations* (see §§ 5051, subd. (f), 5052), but concluded nonetheless that because the public may be misled concerning whether such a person *is licensed* when he or she uses the title "accountant" or the term "accounting services," use of those terms could be enjoined under the Accountancy Act. (66 Cal.App.3d at pp. 328-330.)[7] While the *Hill* court relied on sections 5050 and

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[7]The Court of Appeal below also cited the case of *Chen Chi Wang* v. *United States* (9th Cir. 1985) 757 F.2d 1000, as further authority consistent with the analysis and conclusions reached in *Hill*. *Chen Chi Wang* involved a taxpayer's attempt to quash an Internal Revenue Service summons issued to the financial services organization which had prepared the taxpayer's tax returns. At issue was a treasury regulation defining "accountant" for purposes of a statutory notice requirement for subpoenas issued to third party record keepers. (26 U.S.C. § 7609.) In determining that an accountant who is "registered, licensed, or certified under State law" falls under the definition of third party record keeper within the meaning of the treasury regulation, the *Chen Chi Wang* court relied on *Hill*, *supra*, 66 Cal.App.3d 320, for the proposition that, in California, only licensees under state law may represent themselves to the public as accountants. (757 F.2d at p. 1003.) The court went on to

5051, rather than section 5058 and Regulation 2 in upholding the injunction against use of the title "accountant" and term "accounting" by an unlicensed person in describing services offered to the public, the Legislature is presumed to be aware of that decision and to have acquiesced in the result, one identical to the result under Regulation 2 and the trial court ruling in this case.

In sum, we conclude that by inclusion of the catchall language in section 5058, the Legislature plainly intended that the enumerated list of five prohibited titles *not* be deemed an exclusive one. The Board's determination, embodied in Regulation 2, that the generic terms "accountant" and "accounting" fall within the legislatively defined class of titles or designations "likely to confuse the public," appears reasonably necessary to effectuate the purpose and intent underlying section 5058. Pursuant to section 5010, Regulation 2 is well within the scope of the rulemaking authority conferred upon the Board to "adopt . . . such regulations as may be reasonably necessary . . . for the . . . administration of [the Accountancy Act]." Moreover, for the reasons discussed, the Legislature may also be presumed to have acquiesced in the Board's longstanding interpretation of section 5058. The regulatory scheme thus validly prohibits unlicensed persons from using the generic terms "accountant" or "accounting" standing alone, or in combination with other words that comprise a title or designation "likely to be confused" with the official titles reserved to the Board's licensees.[8]

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observe that, "The fact that a person performs some of the functions of an accountant (e.g., tax preparation) does not make that person an accountant if he or she is unlicensed, just as the fact that a person performs some of the functions of an attorney (a bank officer drafts a will; an insurance officer drafts an insurance contract) does not make that person an attorney." (757 F.2d at p. 1003.)

[8]Justice George draws a contrary conclusion respecting the legislative intent behind section 5058 and the related statutory provisions. His analysis appears grounded on a restrictive reading of those provisions of the act which define the practice of "public accountancy" and thereby circumscribe the Board's jurisdiction. (§§ 5051, 5052.) He interprets the statutory scheme as creating a "special class of accountants comprised of certified public accountants and public accountants," who are in turn

III

The Court of Appeal in this case reached substantially the same conclusion in construing the scope of section 5058,[9] and went on to hold: "The rulings by the United States Supreme Court in *Virginia Pharmacy* [*Va. Pharmacy Bd.* v. *Va. Consumer Council* (1975) 425 U.S. 748] and [*Bates* v. *State Bar of Arizona* (1977) 433 U.S. 350] make it clear that to satisfy the First Amendment, we must permit the use of [the generic terms "accountant" and "accounting"] if they are qualified by a warning or disclaimer that avoids their misleading impact."

Respondent urges that section 5058, as interpreted by the Board in Regulation 2, prohibits *any and all use* of the generic terms "accountant" and "accounting" by unlicensed persons. As

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a subgroup of the broader class of accountants. (Dis. opn. of George, J., *Post*, at p. [typed dis. opn., at p. 1].) According to Justice George's analysis, the unlicensed members of this class of accountants are "authorized . . . to perform a wide range of accounting services. . . ." (Ibid.) In short, under Justice George's interpretation of the statutory scheme, the majority of these unlicensed accountants fall *outside* the regulatory jurisdiction of the Board. With all due respect, this interpretation appears to us to belie the legislative intent underlying the regulatory scheme.

Justice George further reasons that because section 5051, the key provision defining the practice of public accountancy, permits an unlicensed person to perform many of the tasks that are also performed by licensed accountants "[as long as] he or she does not hold himself or herself out, solicit, or advertise for clients using the certified public accountant or public accountant designation," that person may use the title "accountant." (Dis. opn. of George, J., at pp., [typed dis. opn., at pp. 4,6.) Such an interpretation, however, essentially begs the question posed in this case: whether use of the terms "accountant" or "accounting" services, by virtue of their potential likelihood to be confused with the official titles denoting licensure, is tantamount to holding oneself out to the public "as qualified and ready to render professional service . . . as a public accountant for compensation." (§ 5051, sub. (a).)

[9]The Court of Appeal did not rely on Regulation 2 or consider its validity, holding only that because the terms "Accountant" and "Accounting" are misleading to the public they may not be used by unlicensed persons

stated in respondent's brief on the merits, "[The Court of Appeal] decision did not go far enough by failing to unqualifiedly affirm the state's prohibition of the misleading terms in question rather than permitting unlicensed persons to use disclaimer language qualifying such terms." We disagree.

The First Amendment cases do not question the authority of the state to regulate misleading advertising. In *In re R. M. J.*, *supra*, 455 U.S. 191, a case dealing with lawyers' First Amendment commercial speech rights in the advertising of their services to the public, the United States Supreme Court explained:

"Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information may also be presented in a way that is not deceptive. Thus, the Court in *Bates* [v. *State Bar of Arizona, surc*, 433 U.S. 350] suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 433 U.S., at 375. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." (*In re R. M. J.*, *supra*, 455 U.S. at p. 203.)

The high court's most recent commercial speech decisions have consistently applied the holding of *In re R. M. J.*, *supra*. Thus, in *Peel* v. *Attorney Reg. & Disciplinary Com'n.* (1990) ____ U.S. ____, 110 S.Ct. 2281, it was held that an attorney holding a "Certificate in Civil Trial Advocacy" from the "National Board of Trial Advocacy" could not be enjoined by the State of Illinois, which had no similar officially sanctioned certification program of its own, from advertising on his letterhead the truthful fact of his

"certification" by that organization. Following its decisions in *Bates* v. *State Bar of Arizona, supra*, 433 U.S. 350, and *In re R. M. J., supra*, 455 U.S. 191, the court concluded that Attorney Peel's letterhead was entitled to First Amendment protection since the facts stated thereon were "true and verifiable." (110 S.Ct. at p. 2288.)

The high court in *Peel* explained further: "Even if we assume that petitioner's letterhead may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public. *In re R.M.J., supra*, 455 U.S., at 203." (*Peel* v. *Attorney Reg. & Disciplinary Com'n., supra*, 110 S.Ct. at p. 2292.) The court went on to conclude:

"To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organization or the standards of a specialty. *In re R.M.J.*, [*supra,*] 455 U.S., at 201-203. A State may not, however, completely ban statements that are not actually or inherently misleading . . . ." (*Peel* v. *Attorney Rea. & Disciplinary Com'n., supra*, 110 S.Ct. at pp. 2292-2293, fn. omitted; accord *Bates* v. *State Bar of Arizona, supra*, 433 U.S. at p. 384; *Va. Pharmacy Bd.* v. *Va. Consumer Council, supra*, 425 U.S. 748, 771-772.)[10]

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[10]Appellants cite the Eleventh Circuit's recent opinion in *Abramson* v. *Gonzalez* (11th Cir. 1992) 949 F.2d 1567 (*Gonzalez*), as supportive of their claim that they must be permitted to use the generic terms "accountant" or "accounting services" without any restriction. *Gonzalez* addressed the question of whether the State of Florida could ban unlicensed practitioners of psychology from holding themselves out to the public as "psychologists," consistent with First Amendment commercial speech doctrine. Relying principally on the high court's opinion in *Peel* v. *Attorney Req. & Disciplinary Comm'n, supra*, 110 S.Ct. 2281, the *Gonzalez* court concluded Florida's statute placed an unconstitutional restraint on the commercial speech rights of that state's unlicensed psychologists.

Critically, however, under the present state of the law in Florida, *anyone* can practice psychology without a license. That law is slated to

We believe the Maryland Court of Appeals in *Comprehensive. Etc.* v. *Maryland State Bd.* (Md. 1979) 397 A.2d 1019, correctly applied the commercial speech principles first announced by the high court in *Va. Pharmacy Bd.* v. *Va. Consumer Council, supra*, 425 U.S. 74B, and *Bates* v. *State Bar of Arizona, supra*, 433 U.S. 350, to the arena of state regulation of the profession of accountancy. In that case, the Comprehensive Accounting Service Company, which did not hold an enrollment certificate to practice public accounting in Maryland, challenged a Maryland statute that provided no person, partnership or corporation not holding an enrollment certificate " 'shall practice or hold himself or itself out to the public as "accountant" or "auditor" in connection with his own or any other name, nor describe or designate the services offered or performed by him or it as "accounting" or "auditing," with or without any other designation or description . . . .' " (397 A.2d at p. 1020.) Comprehensive Accounting Service Company

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change on October 1, 1995, after which date the profession of psychology in Florida will be *entirely circumscribed* by the Florida Department of Regulation. This anomaly was not lost on the *Gonzalez* court, which observed: "Florida, at least until October 1, 1995, does not require a license for the practice of psychology. The license granted to those who meet certain educational and professional requirements then, is not so much a license to practice as it is a license to speak and advertise." (949 F.2d at p. 1573.) The court concluded: "We hold that as long as Florida has not restricted the practice of psychology, the state may not prevent the plaintiffs from calling themselves psychologists in their commercial speech. If they are allowed to practice psychology, as they apparently are until October 1, 1995 when the law changes, they must be allowed to say truthful things about their work. As long as the plaintiffs do not hold themselves out as *licensed* professionals, they are not saying anything untruthful, for they are in fact psychologists and are permitted to practice that profession under current state law." (Id., at p. 1576, italics in original.)

The relevant commercial speech principles invoked in *Gonzalez, supra*, 949 F.2d 1567, apply in equal fashion to this case. The holding of *Gonzalez* is plainly distinguishable, however, because here the statutory scheme under scrutiny has, as its very purpose, the regulation of the profession of public accountancy; its provisions circumscribe those functions which fall within the definition of "public accountancy" and are thereby expressly reserved to the Board's licensees.

argued that Maryland's express statutory ban unconstitutionally abridged its right of free speech because the statute prevented uncertified persons, who were otherwise permitted to perform ordinary accounting work under that State's so-called "bookkeeping exception," from advertising the true nature of their services.

Invoking the rationale of the United States Supreme Court's decisions in *Va. Pharmacy Bd.* v. *Va. Consumer Council*, *supra*, 425 U.S. 748, and *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. 350, the *Comprehensive* court concluded that the State of Maryland could not, consistent with the First Amendment, completely suppress the dissemination of truthful information about an entirely lawful business activity. (*Comprehensive Etc.* v. *Maryland St.Bd.*, *supra*, 397 A.2d at pp. 1023-1027.) But the *Comprehensive* court also acknowledged the high court's recognition in *Va. Pharmacy Bd.* v. *Va. Consumer Council*, *supra*, and *Bates* v. *State Bar of Arizona*, *supra*, that, "in some cases it may be 'appropriate to require that a commercial message appear in such a form, or include such additional information, warning, and disclaimers as are necessary to prevent its being deceptive.' " (397 A.2d, at p. 1025, quoting *Va. Pharmacy Bd.* v. *Va. Consumer Council*, *supra*, 925 U.S. at pp. 771-772, fn. 24.)

As the rulings by the United States Supreme Court in *Va. Pharmacy Bd.* v. *Va. Consumer Council*, *Bates* v. *State Bar of Arizona*, *In re R. M. J.*, and *Peel* v. *Attorney Reg. & Disciplinary Com'n*, *all supra*, make clear, in order to satisfy the First Amendment, appellants must be permitted to use the terms "accountant," "accounting," or "accounting services," if the use of those terms is further qualified by an explanation, disclaimer or warning stating that the advertiser is not licensed by the state, or that the services being offered do not require a state license, thereby eliminating any potential or likelihood of confusion regarding those terms.

In sum, section 5058 may constitutionally ban only those uses of the generic terms "accountant" and "accounting" that stand to potentially mislead the public regarding the user's licensee or nonlicensee status. The evidence in this case supports the long-standing interpretation of section 5058 as including within its ban the *unqualified* use of those terms as potentially misleading, to

the public's detriment. In contrast, where the generic terms are used in conjunction with a modifier or modifiers that serve to dispel any possibility of confusion — for example, an express disclaimer stating that the "accounting" services being offered do not require a state license — their use in such a context may not be constitutionally enjoined.

## IV

The trial court's judgment and injunction provided, in pertinent part: "Plaintiffs and Cross-Defendants . . . who are not licensed as certified public accountants or public accountants are hereby permanently enjoined directly or indirectly from engaging in any of the following acts or practices: . . . [¶] b. Engaging in the practice of public accountancy without prior compliance with the requirements of sections 5000 et seq. of the Business and Professions Code relating to the licensing of accountants; provided, however, nothing herein is intended to enjoin unlicensed persons from preparing compilation reports, review reports, or audit reports, *although such activities are declared to be unlawful.*" (Italics added.)

Appellants contended on appeal that the trial court exceeded its authority in holding the preparation of compilation reports, review reports and audit reports by unlicensed persons to be illegal. The Court of Appeal agreed, explaining that the Board had never alleged *in its cross-complaint* that appellants were engaged in such illegal activities, and presented no evidence at trial to establish that such activities are illegal; hence, the trial court erred in rendering judgment outside the issues raised by the pleadings or at trial. (7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 30, p. 472.) In its answer to the petition for review, respondent Board has asked this court to further consider whether the Court of Appeal erred in this regard.

We agree with the conclusions of the Court of Appeal respecting the procedural bar. In any event, the trial court's injunction, as worded, is erroneous; unlicensed persons are permitted to make "audits" and prepare "reports," when such is performed "as part of bookkeeping operations." (§ 5052; *ante*, at p. 15, fn. 3.)

V

The judgment of the Court of Appeal is affirmed.

BAXTER, J.

WE CONCUR:

LUCAS, C.J.
PANELLI, J.
ARABIAN, J.

MOORE et al. v. CALIFORNIA STATE BOARD OF ACCOUNTANCY
S017399

## DISSENTING OPINION BY MOSK, J.

I DISSENT. The majority opinion not only violates the intent of the Accountancy Act (Bus. & Prof. Code, § 5000 et seq.),[1] as Justice George's dissent points out, but it also violates the First Amendment of the United States Constitution and article I, section 2(a) of the California Constitution.

On the first of these issues, the State Board of Accountancy (Board) in issuing regulations to effectuate the Accountancy Act (Calif. Code of Reg., tit. 16, § 2, hereinafter Regulation 2) prohibits what the statute permits. That is, section 5052 allows nonlicensed persons to offer basic accounting services "in connection with bookkeeping operations." Thus, such persons are authorized by law to perform accounting; it is axiomatic that those who perform accounting are accountants. Even *People* v. *Hill* (1977) 66 Cal.App.3d 320, 325, a case on which the majority rely, acknowledges that unlicensed persons perform accounting services.

In the face of specific statutory authorization, the Board has in Regulation 2 prohibited unlicensed persons to hold themselves out as accountants or as performing accounting services. The majority uphold this anomalous result by which a truthful representation specifically sanctioned by statute is labelled as misleading to the public.

Indeed, the holding of the majority would render improper a representation by an unlicensed person couched in the specific words of section 5052. The majority hold that an unlicensed person must include an "express disclaimer stating that the 'accounting' services being offered do not require a state license." Thus, such a person who advertises that he or she offers accounting services "in connection with bookkeeping operations," the

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[1]All further statutory references are to the Business and Professions Code.

very language used in section 5052, would run afoul of Regulation 2, according to the majority. An incomprehensible result indeed.

Nor do I agree with the majority's analysis of the purpose of section 5058. They attempt to circumvent application of the doctrine of *ejusdem generis* by holding that the purpose of the catch-all phrase ("any other title or designation that is likely to be confused with 'certified public accountant' or 'public accountant' ") in that provision was to prevent the use of "other terms" the Legislature "had not then identified as misleading . . . or might become misleading in the future." The Legislature could not have had "accountant" in mind as a misleading term not then identified, since that designation was in common use then, as it is now. If the Legislature had wanted to prohibit use of the term by unlicensed persons, it would have done so.

The majority fail to mention that every jurisdiction but one that has considered the issue before us has held, on either statutory or constitutional grounds, that use of the term "accountant" or "accounting" by unlicensed persons is proper. (*People* v. *Freedman* (Colo. 1960) 356 P.2d 899; *Florida Accountants Association* v. *Dandelake* (Fla. 1957) 98 So.2d 323; *Comprehensive Accounting Service* v. *Maryland Board of Accountancy* (Md. 1979) 397 A.2d 1019; *State* v. *Riedell* (Okla. 1924) 233 P. 684; *Burton* v. *Accountant's Society of Virginia Inc.* (Va. 1973) 194 S.E.2d 684; *Tom Welch Accounting Service* v. *Walby* (Wisc. 1965) 138 N.W.2d 139.) Only a single intermediate appellate court in Texas has held to the contrary. (*Fulcher* v. *Texas State Board of Public Accountancy* (Tex.Civ.App. 1978) 571 S.W.2d 366; *Texas State Board of Public Accountancy* v. *Fulcher* (Tex.Civ.App. 1974) 515 S.W.2d 95.) I have serious doubts also whether the majority's conclusion complies with the First Amendment of the federal Constitution or with the California Constitution. While *Peel* v. *Attorney Disciplinary Comm'n of Ill.* (1990) 496 U.S. 91, 109-110 [110 S.Ct. 2281, 2292-2293], does hold that some form of disclaimer may be required if commercial speech would be misleading without it, it also warns that the state has a "heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." (Id., see

also *Anderson* v. *Department of Real Estate* (1979) 93 Cal.App.3d 696.) As we point out above, the unadorned designations "accountant" and "accounting" are accurate as applied to unlicensed persons. The state's interest in preventing misrepresentation can be met by prohibiting persons who are not certified public accountants or public accountants to advertise themselves as such, or to use terms that indicate they have been licensed by the state, rather than insisting upon an express disclaimer, as the majority gratuitously require.

Furthermore, Regulation 2 is itself of questionable validity. In 1948, at the time it was adopted, the Board consisted entirely of licensed accountants. (Stats. 1945, ch. 1353, § 2, p. 2530.) The membership of the Board was broadened in 1961 to include public members (Stats. 1961, ch. 1821, § 39, p. 3877); presently, it consists of 12 persons, 8 of them accounting professionals licensed by the state, and 4 public members. (Bus. & Prof. Code, §§ 5000, 5001.) None of the members of the Board, according to amicus curiae, the Center for Public Interest Law, is an unlicensed person performing accounting work. Amicus curiae states that a large percentage of the accounting work available is of the type that is performed by both licensed and unlicensed accountants. The Board majority has an obvious pecuniary interest in preventing those without a license from advertising to the public that they are performing accounting services. Regulation 2 furthers that interest. The law has long looked with disfavor on rules adopted by a regulatory body the majority of which consists of members of a profession with a pecuniary stake in restricting the rights of competitors. (*State Board* v. *Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, 449; *Allen* v. *California Board of Barber Examiners* (1972) 25 Cal.App.3d 1019, 1017; *Bayside Timber Co.* v. *Board of Supervisors* (1971) 20 Cal.App.3d 1, 12-14.)

One additional point needs to be made. Court opinions should not rely on public opinion polls to support their conclusions. Judicial integrity suffers when judges hold a finger up to see which way the wind is blowing. Indeed, I doubt that poll results — which are notoriously inaccurate — should be admitted in evidence. (There may be one exception, however: in change of venue motions in criminal cases, surveys are often used merely to

reveal if the crime, the victim and the alleged perpetrator are generally known in the community in which the case is to be tried.)

I would reverse the judgment of the Court of Appeal.

MOSK, J.

MOORE v. CALIFORNIA STATE BOARD OF ACCOUNTANCY
S017399

## DISSENTING OPINION BY GEORGE, J.

I RESPECTFULLY DISSENT.

The majority affirms a judgment granting a permanent injunction enjoining appellants from referring to themselves as "accountants" or describing the services they offer as "accounting." Appellants include Bonnie Moore, who possesses a college degree with a major in accounting, and officers and members of the California Association of Independent Accountants, a nonprofit membership organization affiliated with the National Society of Public Accountants. I would reverse the judgment.

As explained more fully below, the Legislature has not required that all accountants be licensed. Instead, it has defined a special class of accountants comprised of certified public accountants and public accountants who exclusively are authorized to perform certain types of accountancy and thus must be licensed. Other accountants are prohibited by Business and Professions Code section 5058[1] and related statutes from using these titles, or similar titles that might be confused with these titles.

The majority acknowledges that unlicensed accountants may perform basic accounting services, but holds that such persons may not call themselves "accountants" or describe the services they offer as "accounting." This holding is not based upon the language of section 5058, which does not expressly prohibit use of the terms "accountant" and "accounting" by unlicensed accountants, but upon a regulation promulgated by the Board of Accountancy (the Board) which prohibits such use of these terms. I disagree with the majority.

I would hold that the Legislature has authorized unlicensed accountants to perform a wide range of accounting services and

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[1]All further statutory references are to the Business and Professions Code unless otherwise indicated.

did not intend to prohibit such persons from accurately referring to themselves as accountants or describing the services they provide as accounting. Because an administrative regulation may not expand the scope of the statute it purports to enforce, the Board lacked the authority to alter this statutory scheme by prohibiting unlicensed accountants from using the terms "accountant" and "accountinq." Accordingly, I find it unnecessary to consider the impact of the First Amendment on this issue. (*Ashwander* v. *Valley Authority* (1936) 297 U.S. 288, 347.)

"Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.]" (*Dyna-Med. Inc.* v. *Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.)

A license is not required to practice "accountancy" in this state, but only to practice "public accountancy" as that term is defined. (§ 5050.)[2]

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[2]Section 5050 states, in part: "No person shall engage in the practice of public accountancy in this State unless such person is the holder of a valid permit to practice public accountancy issued by the board . . . ."

Section 5051 provides that a person is "engaged in the practice of public accountancy" if he or she provides "professional services that involve or require an audit, examination, verification, investigation, certification, presentation, or review, of financial transactions and accounting records . . . [¶] [or] [p]repares or certifies for clients reports on audits or examinations of books or records of account, balance sheets, and other financial, accounting and related schedules, exhibits, statements, or reports which are to be used for publication or for the purpose of obtaining credit or for filing with a court of law or with any governmental agency, or for any other purpose . . . [¶] [or] renders

Section 5051 provides, in part, that an accountant is not engaged in the practice of public accountancy and, thus, does not require a license, if he or she: "(f) Keeps books, makes trial balances, or prepares statements, makes audits, or prepares reports, all as a part of bookkeeping operations for clients. [¶] (g) Prepares or signs as the tax preparer, tax returns for clients. [¶] (h) Prepares personal financial or investment plans or provides to clients products or services of others in implementation of personal financial or investment plans. [¶] (i) Provides management consulting services to clients. [¶] . . . [As long as] he or she does not hold himself or herself out, solicit, or advertise for clients using the certified public accountant or public accountant designation."[3]

Section 5052 provides that an unlicensed accountant may "contract[ ] with one or more persons, organizations, or entities, for the purpose of keeping books, making trial balances, statements, making audits or preparing reports, all as a part of bookkeeping operations, provided that such trial balances, statements, or reports are not issued over the name of such person as having been prepared or examined by a certified public accountant or public accountant."

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professional services to clients for compensation in any or all matters relating to accounting procedure and to the recording, presentation, or certification of financial information or data." (§ 5051, subs. (c)-(e).)

[3]This portion of section 5051, which the Legislature stated was "declaratory of existing law," was added to the statute after the trial in the present case. (Stats. 1989, ch. 489, § 3.) "Under settled principles, the version of the [statute] in force at present is the relevant legislation for purposes of this appeal. 'It is . . . an established rule of law that on appeals from judgments granting or denying injunctions, the law to be applied is that which is current at the time of judgment in the appellate court.' [Citations.]" (*Kash Enterprises, Inc.* v. *City of Los Angeles* (1977) 19 Cal.3d 294, 306, fn. 6; *Building Industry Assn.* v. *City of Oxnard* (1985) 40 Cal.3d 1, 3.)

Sections 5055 and 5056 state that no person other than a certified public accountant (C.P.A.)[4] or public accountant (P.A.)[5] may use those titles or any other title or designation "tending to indicate" that the person is a C.P.A. or P.A.

In similar fashion, section 5058 provides, in pertinent part: "No person or partnership shall assume or use the title or designation 'chartered accountant,' 'certified accountant,' 'enrolled accountant,' 'registered accountant' or 'licensed accountant,' or any other title or designation *likely to be confused with* 'certified public accountant' or 'public accountant,' or any of the abbreviations 'C.A.,' 'E.A.,' 'R.A.,' or 'L.A.,' or similar abbreviations likely to be confused with 'C.P.A.' or 'P.A.' . . . ." (Italics added.)

What the foregoing statutes expressly prohibit is the use by unlicensed accountants of the titles C.P.A. or P.A., or any title or designation likely to be confused with C.P.A. or P.A. The latter titles are reserved for those accountants who are licensed to

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[4]To use the title certified public accountant, a person must receive from the State Board of Accountancy (Board) a "certificate of certified public accountant" and hold a valid permit to practice. (§§ 5033, 5055.) In order to receive a certificate of certified public accountant, a person must earn a baccalaureate degree, with a major in accounting, from an accredited university or its equivalent (§ 5081.1), pass "written examinations in theory of accounts, in accounting practice, in auditing, in commercial law as affecting accountancy, and other related subjects as the certified public accountant members of the board may deem advisable" (§ 5082), and have from three to four years (depending upon the circumstances) of "public accounting experience" (§ 5083).

[5]To use the title public accountant, a person must receive from the Board a "certificate of public accountant" and be issued a permit to practice public accountancy. (§§ 5034, 5056.) For limited periods of time, the first being within six months of the enactment in 1945 of the prohibition against practicing public accountancy without a license and the last ending in 1968, a person who had been engaged in the practice of public accountancy prior to 1945 (and some others including veterans of the armed forces) could receive a "certificate of public accountant" without passage of an examination or meeting any educational requirements. (Stats. 1945, ch. 1353, § 2, p. 2537; Stats. 1967, ch. 709, § 1, p. 2082; Stats. 1968, ch. 519, § 1, p. 1160.)

perform types of accountancy which unlicensed accountants may not perform. But the Legislature did not require that all accountants be licensed and, consistently, did not prohibit unlicensed accountants from using the title "accountant."

This interpretation of section 5058 is supported by one of the basic tenets of statutory construction, the principle of *ejusdem generis*, which instructs that " 'where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. [It] is based on the obvious reason that if the [writer] had intended the general words to be used in their unrestricted sense, [he or she] would not have mentioned the particular things or classes of things which would in that event become mere surplusage.' " [Citations.]" (*Harris* v. *Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160, fn. omitted.) This principle applies with particular force in the present case.

The "general words" in section 5058 form the catchall phrase, upon which the majority relies, prohibiting unlicensed persons from using "any *other* title or designation likely to be confused with 'certified public accountant' or 'public accountant' . . . ." (Italics added.) Considered apart from the context of the statute and the overall scheme of which the statute is a part, this phrase could be construed to prohibit unlicensed accountants from using the term "accountant." But under this construction, which the majority adopts, the enumeration of examples which precede the general words becomes mere surplusage, in violation of the principle of *ejusdem generis*.

This is so because each of the enumerated examples of titles likely to be confused with the titles C.P.A. and P.A. is comprised of the term "accountant" coupled with a modifier, as are the titles C.P.A. and P.A. themselves. The principle of *ejusdem generis* leads me to conclude, therefore, that the catchall phrase in section 5058 does not prohibit the use of the title "accountant" standing alone.

The majority states that the doctrine of *ejusdem generis* is inapplicable because its application "would frustrate the intent

underlying the statute." (Maj. opn., ante, p. [typed maj. opn., p. 19].) The majority fails, however, to describe the method it uses to discern the statute's underlying intent. Instead, the majority simply states its conclusion without explaining its reasoning. I disagree that the doctrine of *ejusdem generis* is inapplicable; rather, it is a useful tool for determining the intent of the legislature based on the language used in drafting the statute.

Had the Legislature meant to prohibit use of the unmodified term "accountant," it simply would have said so. Just as sections 5055 and 5056 expressly prohibit unlicensed accountants from using the titles "certified public accountant" and "public accountant," the Legislature could have added a similar provision expressly prohibiting unlicensed accountants from using the term "accountant" as well. Presumably the Legislature would have done so, had it intended to prohibit such accountants from calling themselves "accountants." "'Where the [Legislature] has demonstrated the ability to make [its] intent clear, it is not the province of this court to imply an intent left unexpressed.' [Citation" (*Peralta Community College Dist.* v. *Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 50.)

The majority agrees "that section 5058 does not itself expressly prohibit the use of the unmodified terms 'accountant' and 'accounting" (maj. opn., *ante*, p. [typed maj. opn., p. 20]) and relies instead on a regulation promulgated by the Board which provides in pertinent part: "The following are titles or designations likely to be confused with the titles Certified Public Accountant and Public Accountant within the meaning of Section 5058 of the Business and Professions Code: [¶] (a) 'Accountant,' 'auditor,' 'accounting,' or 'auditing,' when used either singly or collectively or in conjunction with other titles." (Cal. Code Regs., tit. 16, § 2.)

Such an administrative construction, "although not controlling, is entitled to great weight. [Citations.] . . . The final meaning of a statute, [however], rests with the courts. . . ." '*Administrative regulations that alter or amend the statute or enlarge or impair its scope are void* and courts not only may, but it is their obligation to strike down such regulations." [Citation.] *And this is the rule when, as here, "the statute is subsequently reenacted without*

*change."* [Citations]' " (*Dyna-Med. Inc.* v. *Fair Employment & Housing Com., supra*, 43 Cal.3d 1379, 1388-1389, italics added.)

The above-quoted regulation is invalid because it would expand the scope of section 5058. Nothing in section 5058, or in the statutory scheme of which it is a part, exhibits a legislative intent to prohibit unlicensed accountants from referring to themselves as accountants, or from describing the services they render as accounting. The Board may not expand the scope of section 5058 by enacting a regulation prohibiting conduct which section 5058 would permit.[6]

The majority concludes that by including the catchall phrase in section 5058, the Legislature vested the Board with discretion to prohibit unlicensed accountants from using the title "accountant" if the Board determined the public otherwise might be misled. I disagree for two reasons.

First, the Legislature would not have prefaced the catchall phrase in section 5058 with a list of examples, all of which consist of the term "accountant" coupled with a modifier, had it intended to prohibit, or to authorize the Board to prohibit, the use of the term "accountant" standing alone. Had the Legislature intended to vest the Board with unfettered discretion to prohibit the use of any title the Board found to be misleading, including the unadorned term "accountant," it would have used only the catchall phrase employed in section 5058.

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[6]The majority also notes that both the court of Appeal (*People* v. *Hill* (1977) 66 Cal.App.3d 320) and the Attorney General (46 Ops.Cal.Atty.Gen. 140, 141, (1965)) have concluded that unlicensed accountants are precluded from using the title "accountant." Citing the decision in *Pacific Greyhound Lines* v. *Johnson* (1942) 54 Cal.App.2d 297, 303, the majority concludes that it must be presumed that the Legislature was aware of these constructions of Section 5058 when it thereafter amended the statute. I agree that these factors are significant, but, as recognized in *Pacific Greyhound Lines* v. *Johnson, supra*, 54 Cal.App.2d 297, 303, they "are only aids in statutory construction of a legislative enactment which is so general in its terms as to render an interpretative rule or regulation appropriate. They are not conclusive upon the courts."

By including the examples found in section 5058, the Legislature described the types of titles which might be confused with the titles C.P.A. and P.A. and which the Legislature intended to prohibit unlicensed accountants from using. The title "accountant," standing alone, does not fit this description. To ignore these examples, as does the majority, violates the doctrine of *ejusdem generis*, a doctrine which merely reflects our common experience with the manner in which language is used.

Second, the Board's decision to prohibit use of the term "accountant," because it may be confused with the terms C.P.A. and P.A., constitutes a significant alteration of the statutory scheme. The Accountancy Act creates a rather subtle distinction between "public accountancy," which only C.P.A.'s and P.A.'s may perform, and other types of accountancy, which unlicensed accountants may perform. If the public finds this distinction confusing and erroneously believes that all accountants must be licensed, it must be left to the Legislature to alleviate this confusion by amending the statutes. Neither the Board nor this court possesses the authority to alter the statutory scheme established by the Accountancy Act, however beneficial such alterations might appear to be.

The majority finds persuasive the results of a public opinion poll, commissioned by the state, which posed the following questions: (1) "Do you think that persons who refer to themselves as accountants in advertising to the public are required to be licensed by the State of California," and (2) "Do you think persons who advertise accounting services to the public are required to be licensed by the State of California to offer such services?" More than half the number of persons queried believed that a license was required in both situations.

The majority concludes that the results of this survey "support the inference that members of the public who believe that licensing is required would assume that a person who uses the title 'accountant' and the designation 'accounting' to describe the services offered is licensed by the state. [Fn. omitted.]" (Maj. opn., *ante*, p. [typed maj. opn., p. 25].) This information, however, is not helpful in resolving the issue before us. It is not surprising that a person who erroneously believes that all account-

ants must be licensed would assume that a person using the title "accountant" is licensed. Just as significantly, the survey sheds no light on the relevant issue under section 5058; namely, whether the public is likely to confuse the terms "accountant" and "accounting" with the titles "certified public accountant" and "public accountant." Instead, the survey reveals only that a majority of the public erroneously believes that all accountants must be licensed.[7] It is beyond dispute that no license is required to perform certain types of accounting. The circumstance that a majority of the public believes otherwise is irrelevant.

Section 5058 prohibits unlicensed accountants from using any title that might be confused with the titles C.P.A. and P.A. Contrary to the conclusion reached by the majority, the statute was not intended to prohibit, or to authorize the Board to prohibit, an accountant's use of any term that the public might construe as implying licensure by the state. (Maj. opn., *ante*, p. [typed maj. opn., pp. 3-4].)

The importance of this distinction is demonstrated by the following example. The majority concedes that unlicensed accountants may use the term "accountant" if "used in conjunction with a modifier or modifiers that serve to dispel any possibility of confusion . . . ." (Maj. opn., *ante*, pp. ____, ____ [typed maj. opn., pp. 4, 39].) Consider an unlicensed accountant who uses the title "accountant" but adds an express disclaimer that he or she is not a C.P.A. or P.A. Such a designation certainly would dispel any possibility that the term "accountant" might be confused with the titles C.P.A. or P.A. and, accordingly, would satisfy even the most stringent interpretation of section 5058. It would not, however, dispel possible confusion concerning whether the accountant was licensed by the state because, according to the poll upon which the majority relies, the public mistakenly believes that all accountants are required to be licensed. It can be seen, therefore, that the public's belief as to whether accountants must be

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[7]Assuming, without deciding, that the response to a public opinion is an appropriate basis for deciding an issue of statutory construction, a more useful query would have been: "Do you believe that persons who refer to themselves as accountants are certified public accountants?"

licensed is irrelevant to the determination of the proper scope of section 5058.

Neither the Accountancy Act in general, nor section 5058 in particular, prohibits an unlicensed accountant from using the title "accountant." As the majority recognizes, it is *lawful* for *unlicensed* accountants to perform certain types of accounting services. Nothing in the statutory scheme prohibits unlicensed accountants who lawfully provide accounting services from referring to themselves as accountants, nor does anything in the act authorize the Board to prohibit by regulation what the Legislature has permitted by statute.

Accordingly, I would reverse the judgment of the Court of Appeal. I reach this conclusion on the basis of the plain meaning of the words of the statute as interpreted with the aid of settled principles of statutory construction, and in the absence of any clear expression of legislative intent to the contrary, without regard, of course, to whether it would be good public policy for the Legislature to prohibit unlicensed accountants, whatever their level of education and experience, from calling themselves "accountants."

GEORGE, J.

WE CONCUR:

MOSK, J.
KENNARD, J.

1/3 A046279 - S017399

ORDER DENYING REHEARING

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

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BONNIE MOORE et al.,
*Appellants*

v.

CALIFORNIA STATE BOARD OF ACCOUNTANCY,
*Respondent.*

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Petition for rehearing DENIED.

Mosk, J., Kennard, J. and George, J. are of the opinion the petition should be granted.

/s/
Chief Justice

(FILED AUGUST 27, 1992)

# IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

## FIRST APPELLATE DISTRICT, DIVISION THREE

BONNIE MOORE et al.,
*Plaintiffs, Cross-Defendants and Appellants,*

v.

CALIFORNIA STATE BOARD OF ACCOUNTANCY,
*Defendant, Cross-complainant and Respondent.*

(FILED AUG. 1, 1990)
A046279
(Super Ct. No. 863037 City and County of San Francisco)

In this case we consider whether the California State Board of Accountancy (Board), a public agency, may prohibit unlicensed persons from using the terms "accountant" or "accounting" in holding themselves out to the public. We hold that the unmodified use of these terms may be constitutionally enjoined.

*Procedural History*

In 1986, Bonnie Moore,[1] a non-licensed individual, Accounting Center, a California corporation, and the California Association of Independent Accountants (CAIA), a California non-profit corporation (plaintiffs), filed a complaint against the Board for declaratory relief and a permanent injunction. The complaint alleged that Moore had received a letter from the Board ordering her and Accounting Center to cease and desist from using the terms "accounting" and "accountant" in referring to herself, the business of Accounting Center or the services she offered to the public. The complaint further alleged that resolution of the question whether the Board may constitutionally prohibit use of generic terms such as "accounting" and "accountant" by non-licensed accountants will affect thousands of other non-licensed

[1]After the instant action was filed, Bonnie Moore married and her present name is Bonnie Moore Brown, However, since the suit was filed under the name of Moore, we will refer to her by that name.

accountants practicing within the State of California. Approximately 700 such individuals were currently members of CAIA, and the officers and directors of CAIA joined the action to challenge the Board's actions on behalf of all CAIA members. The complaint sought a declaration that the Board may not constitutionally prohibit plaintiffs or members of CAIA from using the terms "accountant" and "accounting" in referring to non-licensed accountants or the services rendered by them and a permanent injunction ordering the Board to cease all enforcement actions against the use of those terms.

After its demurrer to the complaint was overruled, the Board filed an answer and a cross-complaint for injunctive relief against the named plaintiffs plus 2,000 Doe defendants.[2] The cross-complaint alleged that the cross-defendants were engaged in the practice of public accountancy and of tax preparation within California, yet were not licensed as public accountants or certified public accountants. The cross-complaint prayed in part that cross-defendants be enjoined from using the words "accounting," "accounting services" or "accountant" in referring to themselves or their businesses, or representing themselves as "accountants" in any other manner which would tend to mislead or confuse the public.

During the ensuing court trial, evidence revealed that Moore is president of Accounting Center. She possesses a college degree with a major in accounting. She has never taken an examination to become a certified public accountant (CPA), nor is she interested in doing so. Accounting Center offers small business clients a service consisting of devising and installing basic accounting systems. Once the system is set up, bookkeepers are supervised by degreed accountants. The firm prepares long-range financial projections, monthly financial statements, and "compilation reports," as that term is used by the American Institute of Certified Public Accountants. In a generic sense the firm audits a

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[2]Does 1 through 1,000 were designated California members of CAIA, and Does 1,0001 through 2,000 were designated as individuals who "have transacted and continue to transact business in the County of San Francisco and elsewhere in the State of California."

client's books, but does not produce formal signed audits. Moore conceded she is not qualified to perform the type of formal audits that a CPA does; nor is she qualified to perform services that require a certification of financial statements.

Moore uses the terms "accountant" and "accounting" to describe herself in 90 percent of her advertising. She refers to her business on building directories, in the telephone directory and in radio and television advertising as "Accounting Center."

Like Moore, none of the various officers or members of CAIA who testified at trial have ever passed the CPA examination. Ronald Duffin, former president of CAIA, operates an accounting and tax service. He prepares compilation reports and review reports in the sense that those terms are used by the American Institute of Certified Public Accountants. Edwin Greenstreet, another former president of CAIA, operates a tax, accounting and bookkeeping business. John Jenkins, president-elect of CAIA at the time of trial, owns a bookkeeping and income tax business. Among other services, he prepares reports that are used for the purpose of filing with governmental agencies, and signs the reports as "John Jenkins, Accountant."

In January of 1987, the California Attorney General's office contacted the Field Research Corporation, an independent opinion research firm.[3] The Attorney General's office wanted to determine whether the public thought a person was licensed when that person advertised accounting and accounting services. The specific questions asked in the April 1987 California Poll were: 1) "Do you think that persons who refer to themselves as accountants in advertising to the public are required to be licensed by the State of California?" and 2) "Do you think persons who advertise accounting services to the public are required to be licensed by the State of California to offer such services?" The results of the survey with respect to the first question indicated that 55 percent of the public believed that a person who advertised as an "accountant" had to be licensed, 26 percent did not

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[3]The Field Research Corporation conducts the California Poll, an ongoing survey of Californians which attempts to measure public attitudes on unrelated topics. All results from the poll are made public.

believe that a license was required and 19 percent did not know. The results of the second question indicated that 53 percent believed that a person who advertised accounting services to the public was required to be licensed, 29 percent did not and 18 percent did not know.

After trial, the court entered a judgment denying relief to plaintiffs and granting the Board's request for an injunction restraining plaintiffs from referring to themselves or their services as "accountant," "accounting" and "accounting services." This appeal followed.

## DISCUSSION

*Use of the Terms "Accountant" and "Accounting"*

Originally enacted in 1945, the Accountancy Act (Bus. & Prof. Code, § 5000 et seq.)[4] contains the pertinent statutes relating to accountants in this state. Section 5050 provides in relevant part: "No person shall engage in the practice of public accountancy in this State unless such person is the holder of a valid permit to practice public accountancy issued by the board[.]" At the time of trial, former section 5051 provided in pertinent part: "Except as provided in Sections 5052, 5053, and 5054, a person shall be deemed to be engaged in the practice of public accountancy within the meaning and intent of this chapter:

> "(a) Who holds himself or herself out to the public in any manner as one skilled in the knowledge, science and practice of accounting, and as qualified and ready to render professional service therein as a public accountant[5] for compensation; or

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[4]All further statutory references are to the Business and Professions Code.

[5]"Public Accountant" is defined as "any person who has registered with the board as a public accountant and who holds a valid permit for the practice of public accountancy." (§ 5034.)

"(b) Who maintains an office for the transaction of business as a public accountant; or

"(c) Who offers to prospective clients to perform for compensation, or who does perform on behalf of clients for compensation, professional services that involve or require an audit, examination, verification, investigation, certification, presentation, or review, of financial transactions and accounting records; or

". . . . . .

"(e) Who, in general or as an incident to such work, renders professional services to clients for compensation in any or all matters relating to accounting procedure and to the recording, presentation, or certification of financial information or data."

The most pertinent exception to section 5051 is contained in section 5052 which provides in part: "Nothing in this chapter shall apply to any person who as an employee, independent contractor, or otherwise, contracts with one or more persons, organizations, or entities, for the purpose of keeping books, making trial balances, statements, making audits or preparing reports, all as part of bookkeeping operations, provided that such trial balances, statements, or reports are not issued over the name of such person as having been prepared or examined by a certified public accountant or public accountant."

However, section 5058 states in relevant part: "No person or partnership shall assume or use the title or designation 'chartered accountant,' 'certified accountant,' 'enrolled accountant,' 'registered accountant' or 'licensed accountant,' *or any other title or designation likely to be confused with 'certified Public accountant' or 'Public accountant[.]'* " (Emphasis supplied.)

Thus, the issue presented in the present action is whether individuals who legally perform the services enumerated in section 5052 without being licensed may represent to the public that they are "accountants" and they perform "accounting services."

In *People* v. *Hill* (1977) 66 Cal.App.3d 320, Division Two of this District construed the Accountancy Act as prohibiting an

unlicensed person from holding himself or herself out as being such a person as defined in various subdivisions of section 5051. (Id., at pp. 328-329.) The court reasoned that "[t]he use of the word 'accounting' on the building directory and office door can only be interpreted to mean that he is representing to the public that he is skilled in the practice of accounting and is qualified and ready to provide accounting services to the public, a representation that an unlicensed person is prohibited from doing." (Id., at p. 329.) *Hill* was cited with approval in *Chen Chi Wang* v. *United States* (9th Cir. 1985) 757 F.2d 1000, 1003, for the proposition that it is unlawful for a person to represent himself as an accountant without first having been licensed as such under state law. The court then stated: "Accountants, like attorneys, cannot achieve professional status in California without meeting state licensing standards .... The fact that a person performs some of the functions of an accountant (e.g., tax preparation) does not make that person an accountant if or she is unlicensed, just as the fact that a person performs some of the functions of an attorney (a bank officer drafts a will; an insurance officer drafts an insurance contract) does not make that person an attorney." (Ibid.)

The difficulty with both *Hill* and *Chen Chi Wang* is that neither case considered the constitutional limitations in enjoining unlicensed persons from calling themselves accountants. Courts in other jurisdictions have taken varying positions on this issue. (See Annot. (1981) 4 A.L.R.4th 1201, 1205-1208.) For guidance in this area we consider only the most pertinent decisions in other jurisdictions.

In *Texas State Board of Public Accountancy* v. *Fulcher* (1974) 515 S.W.2d 950 (Fulcher I), the court determined that the Texas Public Accountancy Act, which expressly prohibits unlicensed persons from holding themselves out as accountants, was constitutional. The court reasoned that the Act "does not amount to an unwarranted regulation of private business and the right of a citizen to pursue an ordinary occupation. It does not abridge rights of private property and does not infringe upon rights of contract in matters of purely private concern bearing no perceptible relation to the public welfare. It is not unreasonable, arbitrary,

vague or ambiguous. It does not deny appellee equal protection of the law, nor does it violate any guarantees to appellee under the Bill of Rights, nor does it benefit only a single class, licensed accountants, at the expense of unlicensed accountants and the public as a whole. Every licensing act creates a hardship on those who do not meet its requirements and works to the benefit of those who do, and every licensing act involves a legislative determination that there is or is not a public need for unlicensed practitioners in the profession that is being regulated. The decision by the legislature should not be disturbed unless it is patently violative of constitutional prohibitions and guarantees, or is so ambiguous or vague to the extent that a potential actor cannot determine the point at which his lawful conduct becomes proscribed conduct." (Id., at pp. 955-956; but see *Florida Accountants Association* v. *Dandelake* (1957) 98 So.2d 323, 327-328 and cases cited therein for contrary holdings.)

In *Fulcher* v. *Texas State D. of Public Acc.* (1978) 571 S.W.2d 366 (Fulcher II), the court was called upon to consider whether Fulcher, who had dropped the designation "accountant" but had substituted the word "accounting" to describe his services, could constitutionally employ such terminology, in light of the United States Supreme Court's decisions in *Va. Pharmacy Bd.* v. Va. *Consumer Council* (1976) 425 U.S. 748 ["commercial speech" not entirely outside protection of First Amendment] and *Bates* v. *State Bar of Arizona* (1977) 433 U.S. 350 [advertisement of legal services which is not false, deceptive or misleading may not be subject to restraint]. Relying on language in *Hill*, the Texas court found *Virginia Pharmacy* and *Bates* did not control. "Appellant's holding himself out as possessing expert knowledge in accounting is misleading and remains subject to restraint as stated in Bates[.]" (Fulcher II, supra, 571 S.W.2d 366, 370.)

A contrary result was reached in *Comprehensive, etc.* v. *Maryland State Bd.* (1979) 397 A.2d 1019. In that case, Comprehensive Accounting Service Company, which did not hold an enrollment certificate to practice public accounting in Maryland, challenged a Maryland statute which provides that no person, partnership or corporation not holding an enrollment certificate "shall practice or hold himself or itself out to the public as

'accountant' or 'auditor' in connection with his own or any other name, nor describe or designate the services offered or performed by him or it as 'accounting' or 'auditing,' with or without any other designation or description . . . ." (Id., at p. 1020.) Comprehensive argued that the prohibitions of the statute "unconstitutionally abridge its right of free speech because the statute prevents uncertified persons, who are permitted to perform ordinary accounting work, from advertising the true nature of their services" and "the State cannot, consistent with the first amendment, completely suppress the dissemination of truthful information about an entirely lawful business activity." (Id., at p. 1022.)

The *Comprehensive* court's decision rests on its analysis of *Virginia Pharmacy* and *Bates*. It noted the United States Supreme Court's recognition that in some cases it may be "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers as are necessary to prevent its being deceptive." (*Comprehensive, supra*, 397 A.2d at p. 1025, quoting *Virginia Pharmacy, supra*, 425 U.S. at pp. 771-772, fn. 24.) It similarly referred to the high court's acknowledgement in *Bates* that "supplementation, such as a warning or disclaimer, might be necessary in some circumstances to assure that consumers are not misled." (*Comprehensive, supra*, 397 A.2d at p. 1026.) From these cases, among others, the court concluded, "[t]o prevent the possibility of public confusion and deception, the legislature cannot consistent with the first amendment choose the most drastic remedy — the complete suppression of the use of certain words to describe the lawful activity of non-certified accountants." (Id., at pp. 1026-1027.)

The *Comprehensive* decision contains a more thorough analysis of *Virginia Pharmacy* and *Bates* than does *Fulcher II*. Its conclusion is consistent not only with those cases but with the high court's subsequent holdings that the First and Fourteenth Amendments require that a restriction on advertising be "narrowly tailored" to serve a significant governmental interest. (*Bd. of Trustees of State Univ. of N. Y.* v *Fox* (1989) ____ U.S. ____ [109 S.Ct. 3028, 3033]; *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n* (1980) 447 U.S. 557, 565.)

The case at bench is somewhat different from other reported cases. For the first time an independent survey was introduced into evidence to show that the California public is being misled by use of the terms "accountant" and "accounting." Section 5058 provides that no person shall use any designation that is likely to be confused with "certified public accountant" or "public accountant," the only designations which are licensed by the state. Yet the poll conducted by the Field Research Corporation indicates that more than 50 percent of Californians believe that persons calling themselves "accountant" or advertising accounting services are required to hold licenses. Therefore, we find that the terms "accountant" and "accounting," standing alone, are misleading to the public and may not be utilized by unlicensed persons.

Our conclusion does not mean that the terms "accountant" and "accounting" may never be used by unlicensed persons who perform legally permissible services. The rulings by the United States Supreme Court in *Virginia Pharmacy* and *Bates* make it clear that to satisfy the First Amendment, we must permit the use of those terms if they are qualified by a warning or disclaimer that avoids their misleading impact. While we do not intend to dictate the language which would be acceptable, it is obvious that the term "unlicensed accountant," for instance, is not misleading. Thus, the judgment and injunction in this case must be modified to prohibit only the use of the terms "accountant" or "accounting" without a modifier, qualifier, disclaimer, or warning stating either that the advertiser is not licensed by the state or that the services provided do not require a state license.

*Scope of Judgment and Injunction*

Although CAIA is one of the plaintiffs in this action, none of its members, other than Moore, is a plaintiff. By its cross-complaint Board named as defendants Does 1 through 1,000, members of CAIA. However, the cross-complaint was never amended to insert the true names of the fictitious defendants and none were ever served. Nevertheless, the judgment and permanent injunction entered by the trial court include "members of the California Association of Independent Accountants who are not

licensed as certified public accountants or public accountants." Plaintiffs contend the trial court had no jurisdiction to enjoin individual members of CAIA, since these Doe defendants were neither properly named nor served. As a general rule, when a complaint includes fictitiously-named defendants, and no amended pleading substitutes proper names nor are such defendants served, any resulting judgment is operative only against properly named parties. (*Moulton* v. *Parks* (1883) 64 Cal. 166, 167.) However, there exist certain exceptions to the general rule. "In matters of injunction . . . it has been a common practice to make the injunction run also to classes of persons through whom the enjoined person may act, such as agents, servants, employees, aiders, abetters, etc., though not parties to the action, and this practice has always been upheld by the courts, and any of such parties violating its terms with notice thereof are held guilty of contempt for disobedience of the judgment. . . . [T]he whole effect of this is simply to make the injunction effectual against all through whom the enjoined party may act, and to prevent the prohibited action by persons acting in concert with or in support of the claim of the *enjoined party*, who are in fact *his* aiders and abetters." (*Berger* v. *Superior Court* (1917) 175 Cal. 719, 721, original emphasis omitted; see also *Ross* v. *Superior Court* (1977) 19 Cal.3d 899, 906.)

In the present case all members of the CAIA are not agents or employees of CAIA; nor are they "acting in concert" with the Association. Although plaintiffs' complaint avers that "the officers and directors of CAIA have decided to join in this action to challenge the BOARD's actions on behalf of all of the CAIA members," there is no indication that all members had knowledge of this decision. The Board's cited union cases (*Berger*, *supra*, 175 Cal. 719; *Armstrong* v. *Superior Court* (1916) 173 Cal. 341) are inapposite. In those cases court orders restraining the union from picketing included unnamed union members, since the unions could not picket without the concerted action of its members. In contrast, the officers and directors of CAIA were free to bring an action on behalf of its members without the knowledge, approval or participation by the membership. Therefore, we hold that the judgment and injunction in the present case must be limited to those parties who were properly named in the cross-complaint.

The judgment is reversed and the cause remanded to the trial court for further proceedings consistent with the views expressed herein.

Each party to bear its own costs on appeal.

*CERTIFIED FOR PUBLICATION.*

/s/
White, P.J.

We concur:

/s/
Merrill, J.

/s/
Strankman, J.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

BONNIE MOORE et al.,
*Plaintiffs, Cross-defendants and Appellants,*

v.

CALIFORNIA STATE BOARD OF ACCOUNTANCY,
*Defendant, Cross-complainant and Respondent.*

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ORDER MODIFYING OPINION AND DENYING PETITIONS FOR REHEARING

(FILED: AUG. 29, 1990)

THE COURT:

It is ordered that the opinion filed herein on August 1, 1990, be modified as follows:

1. Change "Field Research Corporation" to "Field Institute" in second line of the last paragraph on page 4 and in the first line of footnote 3 on page 4.

2. Insert the following paragraph on page 15, third paragraph from the end: "Plaintiffs also contend the trial court exceeded its authority in holding the preparation of compilation reports, review reports and audit reports by unlicensed persons to be illegal.[1] The Board never alleged that plaintiffs were engaged in such illegal activities in its cross-complaint; nor did it present evidence that

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[1]Both the judgment and injunction state in pertinent part: "Plaintiffs and Cross-Defendants . . . who are not licensed as certified public accountants or public accountants are hereby permanently enjoined directly or indirectly from engaging in any of the following acts or practices: . . . ¶ b. Engaging in the practice of public accountancy without prior compliance with the requirements of sections 5000 et seq. of the Business and Professions Code relating to the licensing of accountants; provided, however, nothing herein is intended to enjoin unlicensed persons from preparing compilation reports, review reports, or audit reports, *although such activity are declared to be unlawful.*" (Emphasis supplied.)

such activities are illegal at trial. Thus, it was error to render judgment outside the issues raised by the pleadings or at the trial. (7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 30, p. 472.) Accordingly, the judgment and injunction should omit any declaration that these activities are illegal."

This modification does not effect a change in the judgment.

The petitions for rehearing are denied.

/s/
WHITE, P.J.

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER NINETEEN

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BONNIE MOORE, an individual, ACCOUNTING CENTER, a California corporation, and the CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS, a California non-profit corporation,
*Plaintiffs,*

vs.

CALIFORNIA STATE BOARD OF ACCOUNTANCY, A public agency,
*Defendant.*

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CALIFORNIA STATE BOARD OF ACCOUNTANCY, A public agency,
*Cross-Complainant,*

vs.

BONNIE MOORE, an individual, ACCOUNTING CENTER, a California corporation, and the CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS, a California non-profit corporation, DOES 1 through 1000 and 1001 through 2000,
*Cross-Defendants.*

NO. 863-037

STATEMENT OF DECISION

This matter came on regularly before this Court on October 18, 1988 for trial, the Honorable Thomas Dandurand, Judge, presiding without a jury. Ralph C. Alldredge appeared as attorney for Plaintiffs and Cross-Defendants and Wilbert E. Bennett, Supervising Deputy Attorney General, and Edward P. Hill, Deputy Attorney General, appeared as attorneys for Defendant and Cross-Complainant. Oral and documentary evidence having been received, arguments having been presented, the matter having been submitted for decision, and a Statement of Decision having

been requested by Plaintiffs and Cross-Defendants, the Court makes the following Statement of Decision:

The Plaintiffs herein seek to enjoin the Defendant, CALIFORNIA STATE BOARD OF ACCOUNTANCY, from enforcing the provisions of the statutes and regulations prohibiting the practice of public accounting by unlicensed persons, including the use of titles or designations which suggest that the unlicensed individual is licensed and thereby deemed qualified to engage in the practice of public accountancy. The Defendant, CALIFORNIA STATE BOARD OF ACCOUNTANCY, has cross-complained seeking to enjoin the Plaintiffs from using the terms "accountant," "accounting," or "accounting services," or representing themselves as "accountants" in any other manner which would tend to mislead or confuse the public. The Cross-Complainant also sought to enjoin Plaintiffs from engaging in accounting activities which lie outside the range of bookkeeping activities, since the former activities constitute engaging in the practice of public accountancy without prior compliance with State licensing requirements.

The evidence at trial shows that Plaintiff BONNIE MOORE was unlicensed as an accountant as are some of the members of the CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS. The evidence disclosed that Plaintiff BONNIE MOORE and the unlicensed members of the ASSOCIATION did engage in accounting activities requiring licensure and that further they held themselves out as persons qualified to engage in public accounting, thereby misleading the public regarding the level of their qualifications.

The Court finds and concludes that the state regulatory scheme at issue herein is designed to protect the public from the unlicensed practice of public accounting and from misleading representations by unlicensed persons regarding their qualifications to engage in the practice of public accounting. This Court finds the state regulatory scheme to be reasonable and constitutionally valid and that the Plaintiffs' requested relieve could disrupt the legislative licensing scheme designed to protect members of the public.

Based on the foregoing, the Plaintiffs' requested relief to enjoin the CALIFORNIA STATE BOARD OF ACCOUNTANCY from enforcing the State regulatory scheme at issue herein is DENIED.

The Court having found that the Plaintiffs engaged in the unlicensed practice of public accounting, therefore the Court concludes that the Cross-Complainant, CALIFORNIA STATE BOARD OF ACCOUNTANCY, is entitled to an injunction prohibiting the Plaintiffs from the future use of the term "accountant" and similar terms and from engaging in the unlicensed practice of public accounting.

The Court will now address *seriatim* the various points contained In Plaintiffs' and Cross-Defendants' Request for Statement of Decision to the extent that such points are material to the Court's decision.

## I. THE BASIS FOR REJECTING PLAINTIFFS' CONTENTIONS THAT TITLE 16 CALIFORNIA CODE OF REGULATIONS SECTION 2 IS INVALID

A. *People* v. *Hill* (1977) 66 Cal.App.3d 320 held that the statutory scheme embodied in the Accountancy Act, particularly Business and Professions Code sections 5050, 5051, and 5058, prohibited unlicensed persons from using the terms Accountant" or "accounting" in referring to themselves or their business in holding themselves out to the public. Thus, the issue presented in this litigation by Plaintiffs that the prohibition embodied in Regulation 2 is inconsistent with statute, and, accordingly, beyond the Board's rule making authority, is foreclosed from consideration by this Court by the Doctrine of *stare decisis*. The validity of Regulation 2 can not be considered separate and apart from the statutes which it interprets, clarifies, and makes specific.

B. Regulation 2 is an administrative regulation which interprets, clarifies, and makes specific pertinent provisions of the Accountancy Act. No evidence was adduced at trial that violation of Regulation 2 has ever served as the basis for criminal prosecution. Nor, in fact, could such violation serve as the basis for criminal prosecution since it is not a criminal statute.

C. The statutory scheme embodied in the Accountancy Act was judicially construed in *People* v. *Hill* to prohibit unlicensed persons from using the terms "accountant" or "accounting" in referring to themselves or their businesses. Since this Court is bound as a matter of *stare decisis* by the prior judicial construction, the question regarding evidence of legislative intent is immaterial to the Court's decision

D. Principles of statutory construction apply only where statutory language is uncertain or ambiguous. *People* v. *Hill* expressly rejected the arguments of Plaintiffs in this case that the Legislature, through the recital of the various modifiers to the word "accountant" found in Business and Professions Code section 5058, intended to omit the term "accountant" from the list of prohibited terms. 66 Cal.App.3d at 325. In view of prior judicial construction, the applicability of the principle of *ejusdem generis* to the construction of section 5058 is immaterial to the Court's decision.

E. The question whether certain provisions of the Accountancy Act control over other provisions of the Accountancy Act is immaterial to the Court's decision in view of prior judicial construction in *People* v. *Hill.*

F. The Court does not render an advisory opinion regarding whether all uses of the terms "accountant" or "accounting" by unlicensed persons are prohibited by Regulation 2 and the pertinent provisions of the Accountancy Act. Similarly, the Court does not render an advisory opinion concerning the various hypotheticals posed under paragraph I-F in Plaintiffs' and Cross-Defendants' Request for Statement of Decision. Such speculative matters are not material to the Court's decision. The Court merely determines that the use of the terms "accountant" or "accounting" by Plaintiffs comes within the prohibitory ambit of Regulation 2 and Business and Professions Code sections 5050, 5051, and 5058.

G. The Court does not render an advisory opinion regarding whether all uses of the terms "accountant" or "accounting" by unlicensed persons constitute false or misleading advertising, in violation of Business and Professions Code section 17500. This is

a speculative matter which is not material to the Court's decision. It appears, however, that the holding of *People* v. *Hill* is controlling that the use of such terms by unlicensed persons in advertising their services constitutes false and misleading advertising under Business and Professions Code section 17500.

H. *People* v. *Hill* interpreted the statutory scheme reflected in the Accountancy Act, particularly sections 5050, 5051, and 5058, as providing plenary authority for the prohibition against unlicensed persons using the terms "accountant" or "accounting" in holding themselves out to the public. Regulation 2 merely clarifies, interprets, and makes specific the prohibition contained in section 5058. Accordingly, *People* v. *Hill* implicitly established the validity of Regulation 2, in the course of interpreting the statutory scheme reflected in the Accountancy Act.

I. & J. *People* v. *Hill* established that it is unlawful for a person to represent himself as an accountant without first having been licensed as such under State law. Such a representation constitutes the unlicensed practice of public accountancy. The fact that a person may perform some of the functions of an accountant does not make that person an accountant if he or she is unlicensed. Plaintiffs contend that because unlicensed persons, pursuant to the so-called "bookkeeping exemption" contained in section 5052, may legally perform some of the services that may also be performed by licensees, these services should be characterized as "accounting services" and that they should be permitted to advertise the availability of such services. Even though *People* v. *Hill* is controlling on this issue in holding that such advertising is false and misleading, the Court independently finds that permitting unlicensed persons to hold themselves out as offering "accounting services" would mislead the public regarding the level of qualifications of such persons, in violation of Business and Professions Code sections 5050, 5051(a), and 5058.

## II. BASIS FOR COURT'S DECISION REGARDING COMMERCIAL SPEECH ISSUE

A. Regulation 2 and the statutory scheme prohibiting unlicensed persons from using terms such as "accountant" or "ac-

counting" in referring to themselves or their services regulates the accounting profession and applies to commercial speech.

B. The Court finds that the issue of which party bears the burden of proof with respect to the constitutionality of the State regulatory scheme at issue herein is immaterial to the Court's decision, based on the evidence and arguments presented.

C. Whether the decisions in *Comprehensive Accounting Services Co.* and *Parker* are distinguishable from the instant case is immaterial to the Court's decision because these federal and out-of-state cases have no binding effect on this Court.

D-F. The Court finds that Plaintiff BONNIE MOORE's use of the terms "accountant" or "accounting" (as an unlicensed person) to refer to herself or her services, in advertising or otherwise holding herself out to the public, is false and misleading. Such use misleads the public regarding the level of her qualifications by falsely implying a level of competence and expertise which has not been established. Such use deceptively and misleadingly implies that the user of such terms is licensed to practice public accountancy or has competence or expert knowledge or skills in accounting matters, when in truth and fact such competence or expertise has not been established through the examination, education, and experience prerequisites deemed by the Legislature. Moreover, advertising or otherwise holding oneself out to the public as an "accountant" constitutes the unlicensed practice of public accountancy under Business and Professions Code section 5051(a) and is not considered bookkeeping under Business and Professions Code section 5052.

G. Based on the evidence and arguments presented, the Court reasonably infers that a substantial segment of the public believes that use of the terms "accountant" or "accounting," in the context of the offering or performing of professional services, connotes licensure by the State. The State is not required to produce a consumer to testify that he was actually misled. The efficacy of survey evidence to establish the likelihood of public confusion or deception is well-established. In the instant case, survey evidence in the form of the results of the California Field Poll is of some probative value. The Field Poll survey result

establish that a majority of the California adult population believe that persons who refer to themselves as "accountants" or use the term "accounting services" in advertising are required to be licensed. Even in the absence of such empirical evidence, the Court finds that the use of the terms "accountant" or "accounting" by unlicensed persons, in the context here at issue, misleads the public into believing that such persons are actual licensees of the State "skilled in the knowledge, science, and practice of accounting." (See *People* v. *Hill*, 66 Cal.App.3d at 328-331.)

H. The Court determines that it is immaterial to the Court's decision whether the use of the terms "accountant" or "accounting" by unlicensed persons is treated as a question of fact or a question of law. Based on the evidence and arguments presented herein, the Court finds that the use of the terms "accountant" or "accounting" by unlicensed persons, in the context here at issue, is false and misleading. Because there has been a full trial on the merits in this action, the issue of whether the false and misleading character of the advertising is a question of fact or a question of law is immaterial. If it is a question of fact, the Court's finding is supported by the evidence. If it is a question of law, then the holding of *People* v. *Hill* that the use of the terms "accountant" or "accounting" by unlicensed persons in advertising their service constitutes false and misleading advertising is controlling.

I. The Court determines that an unlicensed person's use of the terms "accountant" or "accounting" is more likely to deceive the public into thinking that he or she is licensed by the State than to inform the public as to the nature of the services he or she is legally permitted to perform.

J. The Court is not required to make a finding regarding whether there are any less restrictive alternatives for protecting the public because false and misleading advertising may be prohibited outright by the State and is not subject to a "least restrictive alternative" analysis. Even though the Court is not required to make a finding in this regard, the Court determined that there do not appear to be any less restrictive alternatives available which would effectuate the State's interest in public protection. Requiring unlicensed persons to include negative disclaimer language in their advertising (e.g., "not licensed by the

Board of Accountancy") would create its own species of confusion for consumers and is not viewed as acceptable by either of the parties to this litigation.

K. In *Smith* v. *State of California* (9th Cir. 1964) 336 F.2d 530, 534, the court held that the limitation of titles implying a particular type of expertise to those who have demonstrated their qualifications to an appropriate State authority is a constitutionally valid means whereby the public can be assured that those with whom they deal have met the State's qualifications. Several United States Supreme Court cases have made it abundantly clear that false or misleading commercial speech is not subject to First Amendment protection and may be prohibited outright by the State. See, e.g., *In Re R.M.J.* (1982) 455 U.S. 191, 203; *Central Hudson Gas* v. *Public Service Commission* (1980) 447 U.S. 557, 563-564; *Posadas de Puerto Rico Assoc.* v. *Tourism Co.* (1986) 478 U.S. 328, 340. Thus, in the instant case, the Court's finding that the use of the terms "accountant" and "accounting" by unlicensed persons in holding themselves out to the public is misleading necessarily means that such misleading commercial speech may be prohibited outright.

## III. THE BASIS FOR AND SCOPE OF THE PROPOSED INJUNCTION

A. Plaintiff BONNIE MOORE has violated the Accountancy Act by openly soliciting business from the general public under the business name "Accounting Center," thereby holding herself out as skilled in the knowledge, science, and practice of accounting and as qualified and ready to render professional accounting services for compensation. Plaintiff BONNIE MOORE has not merely held herself out as an accountant but has engaged in professional activities restricted to licensees, to wit: the preparation of compilation reports. (See transcript of Bonnie Moore Brown's testimony, p. 87:8-28; p. 88:1-5.) The latter conduct is also violative of the Accountancy Act.

B. The members of CAIA other than Plaintiff BONNIE MOORE have violated the Accountancy Act in the following respects:

Plaintiff CAIA admits that its members have used the words "accounting" or "accountant" to advertise their availability to perform services for the public through business cards, stationery, yellow page listings, business names, business signs, and city directories. (See Supplemental Interrogatory Answers of CAIA, attached to Exhibit 34.) Plaintiff CAIA further admits that many of its members are currently using the terms "accountant" or "accounting" in referring to themselves or their practices despite the fact that they are not licensed as CPAs or PAs in California. (See paragraph 13 of the Complaint.)

The members of CAIA have not merely held themselves out as accountants but have engaged in the professional activities restricted to licensees. Each of the officers or former officers of CAIA who testified, Ronald Duffin, Joe Greenstreet, and John Jenkins, stated that they have prepared "compilation reports," as that terms is used by the American Institute of Certified Public Accountants (See transcript of Duffin's testimony, p. 109: lines 26-28; p. 110:1, 23-28; p. 111:1-17; p. 113:7-12, 18-21; p. 114:23-26.) (See transcript of Greenstreet's testimony, p. 22:13-28; p. 23:1-14; p. 44:12-16.) (See transcript of Jenkins' testimony) Ronald Duffin and Joe Greenstreet testified that they have prepared review reports, an undertaking requiring even greater sophistication than the preparation of compilation reports. (See transcript of Duffin's testimony, p. 110:2-7.) (See transcript of Greenstreet's testimony, p. 22:10-12; p. 44:90-11.) CAIA admits that its members perform accounting services which include preparation of compilation reports, review reports, and audit reports as those terms are defined in the Statement on Standards for Accounting and Review Services promulgated by the American Institute of Certified Public Accountants. (See Supplemental Answer of CAIA to Interrogatory No. 41, attached to Exhibit 34.)

C. The interests of the individual members of CAIA have been represented by CAIA, which is a party to this case. The factual basis for injunctive relief against individual members of CAIA is that individual CAIA members have held themselves out as accountants and have engaged in the professional activities restricted to licensees, as more particularly set forth in paragraph

III-B above. (See also the admission in paragraph 13 of the Complaint that "(m)any of CAIA's members are currently using the terms 'accountant' or 'accounting' in referring to themselves or their practices despite the fact that they are not licensed as CPAs or PAs in California.") Inasmuch as the interests of the individual CAIA members have been represented in this litigation by CAIA, there is sufficient legal basis for injunctive relief against individual members. Such members would have benefitted from a declaration of this Court favorable to their interests; therefore, it would be inequitable for the members to be immune from injunctive relief against them. In this connection, it should be noted that the Complaint prayed for a declaration that "defendant Board may not constitutionally prohibit Plaintiffs *or the members of CAIA* from using the terms 'accountant' and 'accounting' in referring to non-licensed accountants or the services rendered by them." (Emphasis added.)

D. For purposes of the application of the injunction, membership in CAIA is determined to include all persons who are currently members of CAIA and all persons who will become members of CAIA after the date of the injunction.

E. The Court does not find that CAIA has engaged in the practice of public accountancy or has otherwise offered accounting services to the public.

F. The Court finds that CAIA has promoted, encouraged, and solicited the unlawful practice of public accountancy by its members and other unlicensed persons by promoting the use by unlicensed persons of the false and misleading terms "accountant," "accounting services" and "accounting" in holding themselves out to the public. More specifically, CAIA has represented to unlicensed persons that they may lawfully hold themselves out to the public as "accountants" and are lawfully authorized to advertise their services as "accounting" or "accounting services," in contravention of the provisions of the Accountancy Act. This finding is based on the evidence presented, including the fact that CAIA members have engaged in the unlicensed practice of public accountancy and that CAIA has advocated this position.

G. CAIA is not required to change its name to eliminate the word "accountants" in order to comply with the Court's injunction because that organization is not engaged in the practice of public accountancy.

H. Plaintiff BONNIE MOORE is required to change her business name in order to comply with the Court's injunction so as to eliminate any reference to "accounting."

I. To the extent that Plaintiff BONNIE MOORE or any of the members of CAIA, have current telephone directory listings using the terms "accountant" or "accounting," they are required to change those listings in order to comply with the Court's injunction so as to eliminate any reference to "accountant" or "accounting." This requirement is based on the terms of the Court's injunction and is necessary for the Court's injunction to be effective.

J. The Court's injunction is prospective in operation and does not require Plaintiff BONNIE MOORE, any of the members of CAIA, or CAIA itself to take remedial action with respect to clients or other people who have seen printed material using the terms "accountant" or "accounting."

K. All of the allegations of the Cross-Complaint support the injunction to be entered by the Court.

L. The term "public accounting" as used in the Court's Tentative Decision and Permanent Injunction is synonymous with the term "public accountancy" as used in Business and Professions Code sections 5050 and 5051.

M. The Permanent Injunction prohibiting Plaintiffs and all members of CAIA who are not licensed as certified public accountants or public accountants from "representing themselves as 'accountants' in any (other) manner which would tend to mislead or confuse the public" applies to all of the specific circumstances delineated in sub-paragraphs 1 through 5 of paragraph III-M of Plaintiffs' and Cross-Defendants' Request for Statement of Decision.

N. The Permanent Injunction entered by the Court is not intended to establish any different standards governing the prac-

tice of members of CAIA than the standards which apply to all unlicensed persons under the Accountancy Act and regulations of the State Board of Accountancy.

O. There is no evidence that CAIA has engaged in the "unlicensed practice of accounting"; however, there is evidence that the members of CAIA have so engaged.

P. Plaintiff BONNIE MOORE has engaged in the "unlicensed practice of accounting" by openly soliciting business from the general public under the business name "ACCOUNTING CENTER," thereby holding herself out as skilled in the knowledge, science, and practice of accounting and as qualified and ready to render professional accounting services for compensation. Plaintiff BONNIE MOORE has not merely held herself out as an accountant but has engaged in professional activities restricted to licensees, to wit: the preparation of compilation reports. (See transcript of Bonnie Moore Brown's testimony, p. 87:8-28; p. 88:1-5.) The latter conduct also constitutes the "unlicensed practice of accounting."

Q. The unlicensed members of CAIA other than Plaintiff BONNIE MOORE have engaged in unlawful accounting activities and held themselves out as persons qualified to engage in public accounting in the following respects:

Plaintiff CAIA admits that its members have used the words "accounting" or "accountant" to advertise their availability to perform services for the public through business cards, stationery, yellow page listings, business names, business signs, and city directories. (See Supplemental Interrogatory Answers of CAIA, attached to Exhibit 34.) Plaintiff CAIA further admits that many of its members are currently using the terms "accountant" or "accounting" in referring to themselves or their practices despite the fact that they are not licensed as CPAs or PAs in California. (See paragraph 13 of the Complaint.)

The members of CAIA have not merely held themselves out as accountants but have engaged in the professional activities restricted to licensees. Each of the officers or former officers of CAIA who testified, Ronald Duffin, Joe Greenstreet, and John Jenkins, stated that they have prepared "compilation reports," as

that term is used by the American Institute of Certified Public Accountants. (See transcript of Duffin's testimony, p. 109:26-28; p. 110:1; 23-28; p. 111:1-17; p. 113:7-12, 18-21; p. 114:23-26.) (See transcript of Greenstreet's testimony, p. 22:13-28; p. 23:1-14; p. 44:12-16.) (See transcript of Jenkins' testimony, p. 138:16-25; p. 139:7-23.) Ronald Duffin and Joe Greenstreet testified that they have prepared review reports, an undertaking requiring even greater sophistication than the preparation of compilation reports. (See transcript of Duffin's testimony, p. 110:2-7.) (See transcript of Greenstreet's testimony, p. 22:10-12; p. 44:9-11.) CAIA admits that its members perform accounting services which include preparation of compilation reports, review reports, and audit reports as those terms are defined in the Statement on Standards for Accounting and Review Services promulgated by the American Institute of Certified Public Accountants. (See Supplemental Answer of CAIA to Interrogatory No. 41, attached to Exhibit 34.)

Based on the foregoing, the Court orders that Judgment be entered:

1. Denying the relief requested by Plaintiffs and Cross-Defendants to enjoin the California State Board of Accountancy from enforcing the State regulatory scheme at issue.

2. Permanently enjoining Plaintiffs and Cross-Defendants BONNIE MOORE and the members of the CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS who are not licensed as certified public accountants or public accountants from directly or indirectly engaging in any of the following acts or practices:

a. Using the words "accountant," "accounting," or "accounting services"' in referring to themselves, their businesses or their services in the context of holding themselves out to the public in the offering or rendering of professional services, or representing themselves as "accountants" in any other manner which would tend to mislead or confuse the public.

b. Engaging in the practice of public accountancy without prior compliance with the requirements of sec-

tions 5000, *et seq.* of the Business and Professions Code relating to the licensing of accountants.

3. Permanently enjoining Plaintiffs and Cross-Defendants BONNIE MOORE, CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS and the members of the CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS directly or indirectly from:

a. Representing or suggesting to any unlicensed person engaged in the offering or rendering of professional services to the public that unlicensed persons may lawfully hold themselves out to the public as "accountants" or are lawfully authorized to advertise their services as "accounting" or "accounting services" in contravention of the provisions of the Judgment and Permanent Injunction herein issued by this Court.

b. Promoting or encouraging or soliciting directly or indirectly the unlawful practice of public accountancy, as such unlawful practice has been determined by this Court and set forth in its Judgment herein and in its Permanent Injunction.

4. Ordering Plaintiffs and Cross-Defendants to pay the costs of suit.

DATED: March 16, 1989.

/s/
THOMAS DANDURAND
*Judge of the Superior Court*

MOTION FILED

DEC 2 1 1992

(2)

No. 92-906

In The

# Supreme Court of the United States

October Term, 1992

BONNIE MOORE, ACCOUNTING CENTER, and CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS,

*Petitioners,*

v.

CALIFORNIA STATE BOARD OF ACCOUNTANCY,

*Respondent.*

On Petition For A Writ Of Certiorari To The California Supreme Court

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE PETITIONERS AND BRIEF AMICUS CURIAE FOR THE PETITIONERS

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December 21, 1992

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*of Practicing Accountants; Arkansas Society of Public Accountants; Public Accountants Society of Colorado; Delaware Association of Public Accountants; Florida Association of Independent Accountants; Georgia Association of Public Accountants; Idaho Association of Public Acountants; Independent Accountants Association of Illinois; Indiana Society of Public Accountants; Kentucky Association of Accountants; Louisiana Society of Independent Accountants; Maryland Society of Accountants; Independent Accountants Association of Michigan; Minnesota Association of Public Accountants; Independent Accountants Society of Missouri; Montana Society of Public Accountants; Nebraska Society of Independent Accountants; New Jersey Association of Public Accountants; New Mexico Society of Public Accountants; New York Society of Independent Accountants; North Carolina Society of Accountants; North Dakota Society of Public Accountants; Oklahoma Society of Public Accountants; Oregon Association of Independent Accountants; Pennsylvania Society of Public Accountants; Rhode Island Association of Public Accountants; South Carolina Association of Public Accountants; TAPA (Texas); Utah Society of Public Accountants; Vermont Association of Public Accountants; The Accountants Society of Virginia, Inc.; Washington Association of Accountants; West Virginia Public Accountants Association; Wisconsin Association of Accountants, Inc.; Wyoming Association of Public Accountants; Accreditation Council for Accountancy and Taxation.*

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Thirty-seven Affiliated State Organizations of the National Society of Public Accountants (NSPA) hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent was requested by NSPA Affiliated State Organizations, but refused.

In the instant case, the petitioner has argued an array of meritorious points to the California Court, including a recital of the incompatibility of the decision below with this Court's decision in *Peel v. Attorney Reg. & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990). If the decision in the instant case is left standing, it could have a negative impact, on a national scale, on the First Amendment protections that this Court afforded commercial speech in *Peel*. It is believed that the brief which the proposed *amici curiae* are requesting permission to file will provide a more complete argument and analysis of the issue of the proper application of *Peel* to the instant case. If this argument is accepted, it would be dispositive of this case, in the judgment of the proposed amicus.

Respectfully submitted,

December , 1992

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## LIST OF PARTIES

The petitioners are Bonnie Moore, Accounting Center (a California Corporation) and the California Association of Independent Accountants. Respondent is the California State Board of Accountancy.

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I. Amici Curiae, the affiliates of NSPA, submit that the decision by the California Supreme Court is in direct conflict with this Court's decision in *Peel v. Attorney Reg & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990) ..... 4

II. The absolute ban on the terms is a constitutionally impermissible limit on a non-licensed accountant's freedom of speech, and the California Supreme Court's refusal to strike down the rule leaves open the possibility that other states may adopt similar prohibitions ..... 5

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No. 92-906

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BONNIE MOORE, ACCOUNTING CENTER, and CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS,

*Petitioners,*

v.

CALIFORNIA STATE BOARD OF ACCOUNTANCY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The California Supreme Court**

## BRIEF AMICUS CURIAE FOR THE PETITIONERS

## OPINIONS BELOW

The opinion of the California Supreme Court is reported at 2 Cal. 4th 999. A petition for rehearing was filed by petitioners and was denied on August 27, 1992. The decision of the intermediate California Court of Appeal was issued on August 1, 1990; and the order of that court denying petitions for rehearing filed by both sides and amending its original opinion was issued on August 29, 1990. The Statement of Decision issued by the San Francisco Superior Court on March 16, 1989 is not reported.

## JURISDICTION

The decision of the California Supreme Court was rendered on July 2, 1992. A timely petition for rehearing was denied on August 27, 1992. This brief is filed within 30 days of the filing of Petitioner's Petition for Writ of Certiorari. This Court has jurisdiction to review the decision of the California Supreme Court under 28 U.S.C. § 1257.

## STATEMENT

Thirty-seven Affiliated Organizations of the National Society of Public Accountants (NSPA), support the Appellant's Petition for Certiorari. NSPA believes the California Supreme Court erred by finding that the terms "accountant" and "accounting" may not be used by non-certified accountants without an accompanying modifier or disclaimer. NSPA is the national organization of accountants whose membership is not limited to certified public accountants, and its affiliated State organizations – here as amici – have an obvious interest in measures which seek to limit the use of these generic terms to certified public accountants to the detriment of other legally practicing accountants.[1]

[1] NSPA has 22,000 members and 52 affiliated state organizations (including the District of Columbia, the Virgin Islands and Puerto Rico). NSPA filed an amicus brief in this matter in the court below and has moved for leave to file an amicus brief in support of petitioners in this Court. NSPA's affiliates, other than the California affiliate, which is a party to this case (the

At issue here is the validity of a regulation promulgated by the California State Board of Accountancy which, *inter alia*, called for an absolute ban on the use of the terms "accountant" and "accounting" by anyone other than an individual licensed by the Board.[2] The trial court upheld the State Board's regulation; however, the California Court of Appeal found the absolute ban on the terms to be contrary to established commercial speech doctrine. Unfortunately, the intermediate court declined to strike down the regulation, and instead essentially fashioned its own regulation by ruling that a non-certified accountant could only use the terms in conjunction with a disclaimer stating that the accountant was "unlicensed" or that his or her services do not require a license. Both parties sought reversal of the California Court of Appeal by the California Supreme Court. In a 4-3 decision, the California Supreme Court affirmed the decision of the Court of Appeals without any modification. *Moore v. California State Board of Accountancy*, 2 Cal. 4th 999 (1992). Subsequently, the California Supreme Court denied petitions for rehearing by a 4-3 vote.

---

California Association of Independent Accountants) did not participate in the case below.

[2] California Business and Professions Code § 5058.

## ARGUMENTS

### I

**Amici Curiae, the affiliates of NSPA, submit that the decision by the California Supreme Court is in direct conflict with this Court's decision in *Peel v. Attorney Reg. & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990).[3]**

*Peel* involved the legality of a prohibition by the Illinois bar authorities on an attorney's truthful use of the phrase "Certified Trial Specialist By the National Board of Trial Examiners" on his letterhead in a state which did not certify trial specialists. This Court found the sweeping prohibition invalid, and specifically refused to hold that a disclaimer requirement would be authorized. It recognized that the phrase at issue might be "potentially misleading", but found that "that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public" (496 U.S. at 109). *Peel* suggested that, to the extent that a term may be misleading, the Court might be able to uphold a disclaimer specifically mandated *by the State* as constitutionally permissible. *Nowhere* in the majority opinion was it suggested that the courts were free to fashion their own disclaimer requirements in cases where the plain language of a

---

[3] We believe that the other issues raised in Petition for Certiorari on behalf of Moore are also meritorious, and we do not mean to diminish their significance by focusing on *Peel*. Our purpose is to point out that the California Supreme Court's decision, in light of this Court's decision in *Peel*, could have an especially far-reaching and negative impact on the First Amendment protection that this Court has afforded to commercial speech.

regulation called for a complete prohibition on the use of certain terms.

In his dissent in *Peel*, Justice White asserted that the majority's action should have been more stringent. Basically, Justice White took the position that a disclaimer requirement could be read into the Illinois rule, thereby allowing the court to uphold the restriction and find against Peel on the basis of his failure to include such a disclaimer. However, Justice White did not cite any lower court opinion that reached such a result, nor was he able to persuade any other member of this Court to agree with his position (although three other Justices dissented on other grounds, see 496 U.S. at 119 *et. seq.*). Yet the approach advocated in Justice White's dissent, rejected by eight members of this court, was the approach that, in essence, was adopted by the California Supreme Court below. Therefore, we submit, the decision below is fundamentally flawed because it is inherently inconsistent with this Court's ruling in *Peel*, the case most directly on point.

## II

**The absolute ban on the terms is a constitutionally impermissible limit on a non-licensed accountant's freedom of speech, and the California Supreme Court's refusal to strike down the rule leaves open the possibility that similar prohibitions may be adopted in other states.**

The California Supreme Courts decision lets a regulation that absolute prohibition on the terms "accountant" and "accounting" for accountants other than those certified by the Board stand. Without access to the use of

these terms, these accountants – a large number of whom are members of the affiliates of NSPA that are amici here – will encounter great difficulty in conveying the nature of their services. The likely result would be decreased competition among those providing accounting services, a result that would be detrimental to the consumers of such services. Amici are concerned that a ruling by the highest court of the most populous state may translate into similar uses of sweeping prohibitions on commercial speech in other states, to the detriment of freedom of speech in a wide variety of circumstances, which will include efforts to restrict truthful commercial speech by members of NSPA affiliates.

This Court concluded in *In re R.M.J.* that an absolute ban on the phrase "Practice before: The United States Supreme Court" was "broader than reasonably necessary to prevent the perceived evil," 455 U.S. at 203. In *Peel*, even if the terms were found to be misleading, an absolute ban on the terms would be impermissible absent a showing that anything less would be inadequate. In any case, Amici submit that use of the generic terms "accounting" and "accountant" by non-licensed persons legally performing accounting services is not misleading, and therefore an absolute prohibition is not constitutionally acceptable "if the information is presented in a way which is not deceptive," *In re R.M.J.*, 455 U.S. 191, 203.[4] The ruling below is inconsistent with this Court's

[4] See also, *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992) in which a Florida statute which prohibited unlicensed psychologists from using the term "psychologist" and other like terms was struck down. "If in the legislature's wisdom, all

well established teachings concerning the virtues of truthful commercial speech[5] and, we respectfully submit, beyond the authority of a state Supreme Court.

The circumstances of *Peel* are a virtual replication of those in the instant case, and the approach adopted below by the California Supreme Court was, for all practical purposes, the position taken by one Justice in a dissent in *Peel*. This position was specifically negated by the majority of this Court and, in fact, was not adopted by *any* other member of this Court. The decision rendered by the California Supreme Court is inconsistent with the law of the land as enunciated by this Court in *Peel*.

## CONCLUSION

We urge this Court to grant the Appellant's petition for certiorari in order to review and reverse the decision of the California Supreme Court and protect the right of unlicensed accountants, concerning commercial speech under the First Amendment, to make truthful statements about their lawful services. While the state legislatures may, within constitutional boundaries, require certain disclaimers in commercial speech, by use of the legislative process, which provides opportunity for citizen input

---

persons are allowed to practice psychology, they may not ban entirely some of those practitioners' rights to advertise, for the public has a right to truthful information about the psychological services available to them." 949 F.2d at 1577.

[5] See, *e.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, (1975) 425 U.S. 748 and *Bates & O'Steen v. State Bar of Arizona*, (1977) 433 U.S. 350.

by those who would be affected, the Court below reached beyond its province when it attempted to do so. There was no occasion for non-licensed accountants or the general public who make use of their services to respond to the court's imposition of the disclosure. The court's mandated language, therefore, should be expressly rejected and the possibility of such an approach being taken by courts in other states foreclosed.

Respectfully submitted,

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The National Society of Public Accountants (NSPA) hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent was requested by NSPA, but refused.

In the instant case, the petitioner has argued an array of meritorious points to the California Court, including a recital of the incompatibility of the decision below with this Court's decision in *Peel v. Attorney Reg. & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990). If the decision in the instant case is left standing, it could have a negative impact, on a national scale, on the First Amendment protections that this Court afforded commercial speech in *Peel*. It is believed that the brief which the proposed *amicus curiae* is requesting permission to file will provide a more complete argument and analysis of the issue of the proper application of *Peel* to the instant case. If this argument is accepted, it would be dispositive of this case, in the judgment of the proposed amicus.

Respectfully submitted,

December 22, 1992

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## LIST OF PARTIES

The petitioners are Bonnie Moore, Accounting Center (a California Corporation) and the California Association of Independent Accountants. Respondent is the California State Board of Accountancy.

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San Francisco Superior Court on March 16, 1989 is not reported.

## JURISDICTION

The decision of the California Supreme Court was rendered on July 2, 1992. A timely petition for rehearing was denied on August 27, 1992. This brief is filed within 30 days of the filing of Petitioner's Petition for Writ of Certiorari. This Court has jurisdiction to review the decision of the California Supreme Court under 28 U.S.C. § 1257.

## STATEMENT

The National Society of Public Accountants (NSPA), Amicus Curiae below and here, supports the Appellant's Petition for Certiorari. NSPA believes the California Supreme Court erred by finding that the terms "accountant" and "accounting" may not be used by non-certified accountants without an accompanying modifier or disclaimer. NSPA, as the national organization of accountants whose membership is not limited to certified public accountants, has an obvious interest in measures which seek to limit the use of these generic terms to certified public accountants to the detriment of other legally practicing accountants.[1]

[1] NSPA has 22,000 members and 52 affiliated state organizations (including the District of Columbia, the Virgin Islands and Puerto Rico).

At issue here is the validity of a regulation promulgated by the California State Board of Accountancy which, *inter alia*, called for an absolute ban on the use of the terms "accountant" and "accounting" by anyone other than an individual licensed by the Board.[2] The trial court upheld the State Board's regulation; however, the California Court of Appeal found the absolute ban on the terms to be contrary to established commercial speech doctrine. Unfortunately, the intermediate court declined to strike down the regulation, and instead essentially fashioned its own regulation by ruling that a non-certified accountant could only use the terms in conjunction with a disclaimer stating that the accountant was "unlicensed" or that his or her services do not require a license. Both parties sought reversal of the California Court of Appeal by the California Supreme Court. In a 4-3 decision, the California Supreme Court affirmed the decision of the Court of Appeals without any modification. *Moore v. California State Board of Accountancy*, 2 Cal. 4th 999 (1992). Subsequently, the California Supreme Court denied petitions for rehearing by a 4-3 vote.

---

[2] California Business and Professions Code § 5058.

## ARGUMENT

### I

**NSPA submits that the decision by the California Supreme Court is in direct conflict with this Court's decision in *Peel v. Attorney Reg. & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990).[3]**

*Peel* involved the legality of a prohibition by the Illinois bar authorities on an attorney's truthful use of the phrase "Certified Trial Specialist By the National Board of Trial Examiners" on his letterhead in a state which did not certify trial specialists. This Court found the sweeping prohibition invalid, and specifically refused to hold that a disclaimer requirement would be authorized. It recognized that the phrase at issue might be "potentially misleading", but found that "that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public" (496 U.S. at 109). *Peel* suggested that, to the extent that a term may be misleading, the Court might be able to uphold a disclaimer specifically mandated *by the State* as constitutionally permissible. *Nowhere* in the majority opinion was it suggested that the courts were free to fashion their own disclaimer requirements in cases where the plain language of a

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[3] We believe that the other issues raised in Petition for Certiorari on behalf of Moore are also meritorious, and we do not mean to diminish their significance by focusing on *Peel*. Our purpose is to point out that the California Supreme Court's decision, in light of this Court's decision in *Peel*, could have an especially far-reaching and negative impact on the First Amendment protection that this Court has afforded to commercial speech.

regulation called for a complete prohibition on the use of certain terms.

In his dissent in *Peel*, Justice White asserted that the majority's action should have been more stringent. Basically, Justice White took the position that a disclaimer requirement could be read into the Illinois rule, thereby allowing the court to uphold the restriction and find against Peel on the basis of his failure to include such a disclaimer. However, Justice White did not cite any lower court opinion that reached such a result, nor was he able to persuade any other member of this Court to agree with his position (although three other Justices dissented on other grounds, see 496 U.S. at 119 *et. seq.*). Yet the approach advocated in Justice White's dissent, rejected by eight members of this court, was the approach that, in essence, was adopted by the California Supreme Court below. Therefore, we submit, the decision below is fundamentally flawed because it is inherently inconsistent with this Court's ruling in *Peel*, the case most directly on point.

## II

**The absolute ban on the terms is a constitutionally impermissible limit on a non-licensed accountant's freedom of speech, and the California Supreme Court's refusal to strike down the rule leaves open the possibility that other states may adopt similar prohibitions.**

NSPA has an interest in the nationwide, uniform application of the First Amendment protection afforded commercial speech. The decision by the California Supreme Court, which lets the absolute ban on the terms stand, will affect not only accountants and their clients within that state, but, as a ruling by the highest court of the most populous state, may well influence other state

and federal courts, to the detriment of freedom of speech in a wide variety of circumstances. Moreover, this Court concluded in *In re R.M.J.* that an absolute ban on the phrase "Practice before: The United States Supreme Court" was "broader than reasonably necessary to prevent the perceived evil," 455 U.S. at 203. In *Peel*, even if the terms were found to be misleading, an absolute ban on the terms would be impermissible absent a showing that anything less would be inadequate. In any case, the NSPA submits that use of the generic terms "accounting" and "accountant" by non-licensed persons legally performing accounting services is not misleading, and therefore an absolute prohibition is not constitutionally acceptable "if the information is presented in a way which is not deceptive," *In re R.M.J.*, 455 U.S. 191, 203. The ruling below is inconsistent with this Court's well established teachings concerning the virtues of truthful commercial speech[4] and, we respectfully submit, beyond the authority of a state Supreme Court.

The circumstances of *Peel* are a virtual replication of those in the instant case, and the approach adopted below by the California Supreme Court was, for all practical purposes, the position taken by one Justice in a dissent in *Peel*. This position was specifically negated by the majority of this Court and, in fact, was not adopted by *any* other member of this Court. The decision rendered by the California Supreme Court is inconsistent with the law of the land as enunciated by this Court in *Peel*.

---

[4] See, *e.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, (1975) 425 U.S. 748 and *Bates & O'Steen v. State Bar of Arizona*, (1977) 433 U.S. 350.

## CONCLUSION

We urge this Court to grant the Appellant's petition for certiorari in order to review and reverse the decision of the California Supreme Court and protect the right of unlicensed accountants, concerning commercial speech under the First Amendment, to make truthful statements about their lawful services. While a legislative body, within constitutional boundaries, may require certain disclaimers in commercial speech by its legislative process, which provides opportunity for citizen input by those who would be affected, the court below reached beyond its province when it imposed disclosure there. There was no occasion for non-licensed accountants or the general public who make use of their services to respond to the court's imposition of the disclosure. The court's mandated language, therefore, should be clearly rejected.

Respectfully submitted,

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*Petitioners,*

vs.

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*Respondent.*

**Petition For A Writ Of Certiorari To The California Supreme Court**

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

***and***

**BRIEF OF THE CENTER FOR PUBLIC INTEREST LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### ISSUES PRESENTED

1. Where a state occupational licensing board is statutorily controlled by a specific type of practitioner, may it lawfully deprive its competitors of the right to use terms which accurately describe the occupational services rendered, under threat of civil penalties, fines, and criminal prosecution?

2. What are the implications of this question *vis-a-vis*:

(a) due process rights to a fair and impartial tribunal for both rulemaking and adjudication; and

(b) the requirement of "*independent* state supervision" required for "state action exemption" from federal Sherman Act antitrust scrutiny?

### APPLICANT

Applicant Center for Public Interest Law ("CPIL" or "Center") respectfully requests this Honorable Court's permission to file an *amicus curiae* brief in support of the petition for certiorari filed by Bonnie Moore, Accounting Center, and California Association of Independent Accountants ("Petitioners") in the above-encaptioned case.

CPIL is a nonprofit academic and research center at the University of San Diego School of Law. Since 1980, CPIL has represented the interests of the unorganized

and underrepresented in state regulatory proceedings, and operated an academic center of research, learning, and advocacy in administrative and public interest law. The Center's primary goals are to ensure that state occupational licensing agencies regulate in the *public* interest (rather than in the interest of the trade or profession regulated), and to make the regulatory function of California state government more efficient, visible, and responsive by serving as a public monitor of state regulatory agencies. For twelve years, CPIL has published the *California Regulatory Law Reporter,* a quarterly legal journal summarizing and analyzing the activities of over sixty California regulatory agencies, including the State Board of Accountancy (Respondent herein). CPIL professional staff members specialize in regulatory, constitutional, and antitrust law.

At the request of Petitioners and their counsel, CPIL has actively participated as an *amicus curiae* in this proceeding for over three years. In California's First District Court of Appeal, CPIL filed an *amicus curiae* brief in support of Petitioners on November 10, 1989, and a reply brief on February 8, 1990. In the California Supreme Court, CPIL filed an *amicus curiae* brief on January 11, 1991, and a letter brief in support of Petitioners' motion for rehearing on July 17, 1992. Both the First District Court of Appeal and the California Supreme Court permitted CPIL to appear as an *amicus* in this case, over the repeated objections of Respondent and its counsel.

## APPLICANT'S INTEREST

Petitioners represent one faction within the accountancy profession – those who lawfully perform accountancy functions and tasks which do not require a certified public accountant's (CPA) license. Respondent is the State Board, which licenses only CPAs and is controlled by currently practicing CPAs by statutory requirement. Applicant Center for Public Interest Law represents a significant absent interest: consumers who will be affected by the outcome. No individual or organization has appeared as an intervenor or *amicus curiae* on behalf of the CPA profession in this case; the profession needs no additional representation given its control of the state agency party before this Honorable Court. Without CPIL participation, the interests most affected by the outcome in this case – those of government in the public interest and those of the consumers of accountancy services – are completely unrepresented. And, in terms of the due process and antitrust implications of the issues here in dispute, neither party may assuredly raise issues or arguments of interest to the Court which do not coincide with the economic and legal interests of accountants.

CPIL recognizes that this Court's rules provide that the filing of an *amicus* brief at the petition stage when all parties have not consented is "not favored," Rule 37.2. However, CPIL has made a substantial contribution to this case for over three years, and its argument was adopted by the senior justice of the California Supreme Court in a dissenting opinion. (See dissent of Mosk, J., in Appendix to Petition for Writ of Certiorari, at 29-32.) Petitioners, who have focused on the commercial speech and separation of powers issues, have not addressed

CPIL's due process and antitrust issues in the state courts, and will not fully address them in this Court. Further, even if so disposed, Petitioners lack the expertise and perspective of this Applicant in this area. Respondent will not address these issues, fears their illumination, and has refused to consent to CPIL's filing of an *amicus* brief (*see infra*). Yet these issues are critical to this Court's understanding and resolution of the California courts' errors in approaching and purporting to resolve this important constitutional and federal antitrust matter.

## IDENTITY OF PARTY WHO REFUSED CONSENT

On November 16, 1992, Applicant CPIL requested permission to file an *amicus curiae* brief in support of the Petition for Writ of Certiorari from counsel for Respondent Board of Accountancy, Wilbert E. Bennett. By letter of December 14, 1992, Mr. Bennett refused consent.

Through their counsel Ralph C. Alldredge, Petitioners have consented to the filing of the instant *amicus curiae* brief.

For each of the reasons stated herein, Applicant Center for Public Interest Law respectfully urges this Court to grant its motion to file an *amicus curiae* brief in support of the Petition for Writ of Certiorari.

Dated: December 24, 1992.

ROBERT C. FELLMETH
JULIANNE B. D'ANGELO
*Counsel for Applicant*
*Center for Public Interest Law*

No. _____

In The

# Supreme Court of the United States

October Term, 1992

BONNIE MOORE, ACCOUNTING CENTER, and CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS,

*Petitioners,*

vs.

CALIFORNIA STATE BOARD OF ACCOUNTANCY,

*Respondent.*

**Petition For A Writ Of Certiorari To The California Supreme Court**

## BRIEF OF THE CENTER FOR PUBLIC INTEREST LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## INTEREST OF *AMICUS CURIAE*

As noted in the accompanying motion, the Center for Public Interest Law (CPIL) is a nonprofit academic and research center at the University of San Diego School of Law. The Center's primary goals are to ensure that state occupational licensing agencies regulate in the *public* interest (rather than in the interest of the trade or profession regulated), and to make the regulatory function of California state government more efficient, visible, and responsive by serving as a public monitor of state regulatory agencies. For twelve years, CPIL has published the *California Regulatory Law Reporter*, a quarterly legal journal summarizing and analyzing the activities of over sixty California regulatory agencies, including the State Board of Accountancy (Respondent herein). CPIL professional staff members specialize in regulatory, constitutional, and antitrust law.

In this matter, Petitioners represent one faction within the accountancy profession – those who lawfully perform accountancy functions and tasks which do not require a certified public accountant's (CPA) license. Respondent is the State Board, which licenses only CPAs and is controlled by currently practicing CPAs by statutory requirement. Applicant Center for Public Interest Law represents a significant absent interest: consumers who will be affected by the outcome. No individual or organization has appeared as an intervenor or *amicus curiae* on behalf of the CPA profession in this case; the profession needs no additional representation given its control of the state agency party before this Honorable Court. Without CPIL participation, the interests most

affected by the outcome in this case – those of government in the public interest and those of the consumers of accountancy services – are completely unrepresented. And, in terms of the due process and antitrust implications of the issues here in dispute, neither party may assuredly raise issues or arguments of interest to the Court which do not coincide with the economic and legal interests of accountants.

CPIL has actively participated as an *amicus curiae* in this proceeding for over three years. CPIL has made a substantial contribution to this case, and its argument was adopted by the senior justice of the California Supreme Court in a dissenting opinion. (See dissent of Mosk, J., in Appendix to Petition for Writ of Certiorari, at 29-32.) Petitioners, who have focused on the commercial speech and separation of powers issues, have not addressed CPIL's due process and antitrust issues in the state courts, and will not fully address them in this Court. Further, even if so disposed, Petitioners lack the expertise and perspective of this Applicant in this area. Respondent will not address these issues, fears their illumination, and has refused to consent to CPIL's filing of an *amicus* brief (*see supra*). Yet these issues are critical to this Court's understanding and resolution of the California courts' errors in approaching and purporting to resolve this important constitutional and federal antitrust matter.

## SUMMARY OF ARGUMENT

The Center for Public Interest Law (CPIL or Center) appears herein as *amicus curiae* on behalf of Petitioners

Bonnie Moore, Accounting Center, and the California Association of Independent Accountants (CAIA) (hereinafter "Petitioners"), and urges this Honorable Court to grant their petition for writ of certiorari in the above-entitled case.

Although Respondent and its attorney seek to overly complicate this case, it is actually very simple. It presents the all-too-common scenario of a state occupational licensing board purporting to act in the public interest but controlled by members of the very profession regulated by that board, and attempting to impose advertising restrictions on direct competitors in order to capitalize on their consequent loss of business.

The Board of Accountancy licenses certified public accountants (CPAs) in California. It is comprised of eight Board licensees and four nonlicensee public members. In the Accountancy Act, California Business and Professions Code section 5000 *et seq.*, the legislature has specified that a very narrow slice of what is generally known as "accounting" (specifically, the preparation of a formal audit with an accompanying certified opinion of soundness) may be performed only by a CPA. Through section 5052,[1] the California legislature has for many years countenanced and authorized non-CPAs to engage in other aspects of accountancy, and thousands have so practiced from the advent of accountancy practice in the state.

In section 5058, the legislature has specified that only CPAs may use the term "certified public accountant" and

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[1] All statutory references are to the California Business and Professions Code, unless otherwise noted.

other enumerated accounting titles and abbreviations. On the three occasions the legislature has amended section 5058 in the past 45 years, it has never prohibited the use of the unmodified term "accountant" by non-CPA accountants engaged in accounting activities expressly permitted in section 5052.

In 1948, the Board of Accountancy adopted "Rule 2" (section 2, Division 1, Title 16, California Code of Regulations). That rule was adopted by a board consisting entirely of licensees prior to the effectuation of the modern Administrative Procedure Act providing for notice, hearing, and review of proposed regulations. Rule 2 bars non-CPA accountants engaged in lawful accounting activity under section 5052 from using the terms "accountant" or "accounting" to describe themselves or their services. However, the Board did not enforce Rule 2 until recent years – that is, until the fees for CPA services have soared, putting them out of the reach of the small business owner, the farmer, the sole practitioner, and the individual consumer who needs general accounting services but not the auditing expertise reserved to CPAs by the legislature.

In the courts below, CPIL demonstrated that less than 20% of CPA firms perform certified audit work as their main source of income,[2] and noted that California CPAs

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[2] California Society of Certified Public Accountants' Task Force on Certification Requirements, presented to State Board of Accountancy at Oxnard, California (Jan. 27-28, 1989), attached as Exhibit B to Applicant's *Amicus Curiae* Briefs filed in the First District Court of Appeal on November 10, 1989, and in the California Supreme Court on January 11, 1991.

directly compete with non-CPA accountants for at least 80% of the accounting business in the marketplace; both CPA licensees and non-CPA accountants seek to perform the identical services. As CPA fees have risen, and as the volume of accounting business diverted from CPAs to non-CPA accounting practitioners has ballooned, so has the CPA profession's desire to put unlicensed accountants out of business, or at least severely restrict their advertising ability. In particular, CPAs desire to prevent unlicensed accountants from advertising in telephone directories under the heading "Accountant." Rule 2 – adopted and enforced by a board controlled by CPAs – fulfills this desire. Very simply, that is the bottom line in this case.

Both the California court of appeal and the California Supreme Court agreed with Petitioners that the Board's absolute ban on the use of the terms "accountant" and "accounting" by non-CPA accountants is constitutionally defective; however, neither court invalidated Rule 2. Instead, the appellate court improperly rewrote the rule at issue to permit non-CPAs to use the subject terms if accompanied by a mandatory disclaimer specifying that the user is unlicensed, or that the services rendered do not require a license. The California Supreme Court affirmed by a 4-3 vote, and denied a motion for rehearing by an identical 4-3 vote.

The Center for Public Interest Law urges this Honorable Court to grant Petitioners' petition for writ of certiorari on the grounds argued by counsel for Petitioners; to wit:

1. Rule 2 unjustifiably infringes the first amendment commercial speech rights of non-CPA accountants in California.

2. The court of appeal and the California Supreme Court improperly attempted to rewrite both the regulation and the legislation at issue. The courts were asked to validate or invalidate Rule 2; instead, they usurped the role of regulatory agency and legislature by specifying the use of a term which is inconsistent with both the regulation and the statutory scheme at issue.

Additionally, CPIL urges this Honorable Court to recognize the following significant issues:

3. Where a rulemaking and adjudicatory body consists primarily of licensees belonging to a specific economic grouping (*e.g.*, one type of accountant) in competition with other similar practitioners, is it constitutional for those board members to use the power of the State to adopt and enforce rules of practice to their economic advantage against groups not represented in the relevant tribunal?

4. Where members of an entity collude to engage in a group boycott against competitors which affects interstate commerce, will such action be immunized from federal antitrust scrutiny where the state agency purportedly supervising the anticompetitive conduct is controlled by members of the profession benefiting from that conduct?

## I. RESPONDENT'S COMPOSITION CONSTITUTIONALLY DISQUALIFIES IT FROM ADOPTING AND ENFORCING RULE 2

As noted above, Respondent Board of Accountancy is currently required to be composed of eight Board licensees and four other members (none of whom are non-CPA accountants) pursuant to Business and Professions Code section 5000. When the Board adopted Rule 2 in 1948, it consisted of five licensed accountants.

Rule 2 purports to clarify Business and Professions Code section 5058, which prohibits the use of modified titles likely to be confused with the terms "certified public accountant" and "public accountant." Rule 2 prohibits non-CPA accountants from using the unmodified terms "accountant," "auditor," "accounting," and "auditing," as well as "any other titles or designations which imply that the individual is engaged in the practice of public accountancy" as "likely to be confused with" the regulated titles. The adoption of this rule by a board dominated by persons with a pecuniary stake in the rulemaking decision, and which is adverse to the interests of unregulated competitors, violates the due process rights of non-CPA accountants who directly compete with CPAs for accountancy business in the marketplace.

This Honorable Court has consistently upheld the fundamental principle that members of a multi-member governmental entity may not abuse their agency rulemaking authority to promote their own pecuniary interests. In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), this Court examined the Bituminous Coal Conservation Act of 1935, a federal statute which purported to regulate the mining

of coal by, *inter alia*, establishing a National Bituminous Coal Commission and 23 coal districts, each with a specified membership. Section 4, Part III(g), of the Act delegated "the power to fix maximum hours of labor to a part of the producers and the miners – namely, 'the producers of more than two-thirds of the annual national tonnage production for the preceding calendar year' and 'more than one-half of the mine workers employed'; and to producers of more than two-thirds of the district annual tonnage during the preceding calendar year and a majority of the miners, there is delegated the power to fix minimum wages for the district or groups of districts." *Id.* at 310-11. Viewing the issue as one of unlawful delegation of legislative power, the Court stated:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . [O]ne person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.

*Id.* at 311.[3]

Prior to its decision in the instant case, California adhered to the rule in *Carter*. In *Bayside Timber Company, Inc. v. Board of Supervisors of San Mateo County*, 20 Cal. App. 3d 1 (1971), the First District Court of Appeal struck down a regulatory scheme mandated by statute, wherein timber operators and loggers were permitted to collude in cartel-like fashion to adopt rules regulating logging in various state districts under the jurisdiction of the State Board of Forestry. The court held that the legislature's standardless delegation of authority to industry-controlled regional committees was "violative of the state and federal Constitutions . . . and otherwise denies due

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[3] Following this Court's invalidation of the labor and price-fixing provisions of the 1935 Act in *Carter*, Congress enacted the Bituminous Coal Act of 1937, which withstood a constitutional challenge in *Sunshine Coal Co. v. Adkins*, 310 U.S. 381 (1940). Although the *Carter* Court's construction of the reach of interstate commerce clause has been largely discarded, *see United States v. Darby*, 312 U.S. 100, 123 (1941); *see also Equal Employment Opportunity Commission v. Wyoming, et al.*, 460 U.S. 226, 247 (1982) (Stevens, J., concurring), its prohibition on delegation of legislative authority to an agency or group of individuals with a pecuniary interest in its subject matter retains vitality. *See, e.g., State Board of Dry Cleaners v. Thrift-D-Lux Cleaners*, 40 Cal. 2d 436 (1953) (California Supreme Court invalidates minimum price schedule for the dry cleaning industry adopted by board dominated by dry cleaners); *Allen v. California Board of Barber Examiners*, 25 Cal. App. 3d 1014 (1972) (appellate court invalidates minimum price schedules established by a board consisting of four barbers and one public member); and *Bayside Timber Co., Inc. v. Board of Supervisors of San Mateo County*, 20 Cal. App. 3d 1 (1971) (appellate court invalidates state Forest Practice Act permitting loggers and timber operators to collude in adopting rules regulating the logging industry).

process of law to the interested and affected public." *Bayside Timber*, 20 Cal. App. 3d at 14. Concluding that, under the statutory scheme, "the content of the rules under which private logging operations are conducted is decreed exclusively by persons pecuniarily interested in the timber industry, *i.e.*, timber owners and operators," *id.* at 10, the First District invalidated the statute, recognizing the "age-old principle of our law that no man should judge or otherwise officially preside over disputed matters in which he has a pecuniary interest." *Id.* at 14.

The *Bayside Timber* court found the presence of non-industry members on the Board of Forestry to be an ineffective safeguard against the heavy bias in favor of logging interests created by the statutory scheme. Additionally, the court found that the interest in protecting against *public* injury (that is, "public injury [which] must inevitably result from placing exclusive control of the logging industry in the hands of persons who may be expected to profit most from the gathering of logs at the lowest cost and without environmental safeguards") deserves the same if not greater level of protection as does the potential injury to "individual *private* rights resulting from the creation of unfairly constituted public boards." *Id.* at 14 (emphasis original).

This case is not solely concerned with rulemaking by a state agency controlled by those with an impermissible pecuniary interest in the proceedings; for the CPA-controlled Board of Accountancy has also attempted to enforce its rulemaking through its adjudicatory authority. Although dormant for many years, the Board's recent enforcement of Rule 2 has taken the form of "cease and

desist" letters to unlicensed practitioners, ordering them to refrain from using the terms "accountant," "accounting," or "accountancy" in their advertising, business cards, letterhead, or elsewhere to describe themselves or their work. The Board of Accountancy – which, like other occupational licensing/regulatory agencies, functions as investigator, prosecutor, and judge in adjudicatory proceedings – has aimed its prosecutorial threats at individual unlicensed practitioners such as Bonnie Moore who provide accounting services to small businesses and individuals. The "cease and desist" letter sent to Moore included the threat of criminal prosecution.

Like the issue of abuse of rulemaking authority by a conflicted regulatory board, the issue of improper enforcement by a biased agency is not one of first impression. It is well settled that a fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955). Due process requires a competent and impartial tribunal in administrative hearings. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). In *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Court found that the Alabama Board of Optometry was an unfair tribunal for purposes of instituting adjudicatory proceedings against competitor licensed optometrists. The Board, which consisted exclusively of private-practice optometrists, instituted disciplinary actions against several licensed optometrists who were employed by business corporations. The respondent corporate optometrists filed a civil rights action in federal court in an attempt to enjoin the Board's disciplinary proceedings. The district court halted the Board's action on two grounds: (1) prejudgment (the Board had previously filed a complaint in state court

against these same corporate optometrist respondents, alleging unlawful practice of optometry and unprofessional conduct); and (2) pecuniary interest (the court found that the respondent corporate optometrists accounted for nearly half the practicing optometrists in Alabama; if the licenses of these optometrists were revoked, the private practitioner board members would personally benefit). *Id.* at 578.

In enjoining the Board's license revocation action, the Supreme Court held: "[a]rguably, the District Court was right on both scores, but we need reach, and we affirm, only on the latter ground of possible personal interest." *Id.* at 579. Citing the landmark cases of *Tumey v. Ohio*, 273 U.S. 510 (1927) (mayor-judge with personal pecuniary interest in outcome of liquor law violation cases ruled unfair tribunal for such cases), and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (mayor-judge with only indirect pecuniary interest in convictions resulting in fines ruled unfair tribunal), the Court stated that "[i]t is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." Further, the Supreme Court cited the district court's reasoning that "the inquiry was not whether the Board members were 'actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.' " *Gibson*, 411 U.S. at 571.[4]

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[4] Prior to the instant matter, the California courts applied the *Gibson* rule vigorously. In a series of cases, the courts held that the statutory composition of the New Motor Vehicle Board

The fairness principles illustrated in these cases are easily applied to the case at hand, in both the rulemaking and adjudication contexts. In *Carter* and *Bayside Timber*, the coal and timber industries, respectively, controlled the regulation of those very industries; in *Bayside Timber*, the rules adopted invariably favored the timber industry to the detriment of the general public and other interests ostensibly sought to be protected by the Forest Practice Act. In *Gibson*, an optometry board controlled by one segment of the profession targeted another segment of that profession for enforcement proceedings. These actions were properly invalidated on due process grounds.

Here, the Board of Accountancy in 1948 – comprised of five licensed accountants, *no* public members, and *no* non-CPA accountants lawfully rendering services under what is now Business and Professions Code section 5052 – conducted rulemaking proceedings and adopted a regulation with the force of law which prohibits another kind of accountant from using the term "accountant" or "accounting" to describe his/her services. The Board then

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(four car dealer members, five public members, and no manufacturer members) deprived manufacturers of their due process right to a fair and impartial tribunal and disqualified the Board from issuing adjudicatory decisions in disputes involving manufacturers. *See University Ford Chrysler-Plymouth v. New Motor Vehicle Board*, 179 Cal. App. 3d 796 (1986); *Nissan Motor Corp. v. New Motor Vehicle Board*, 153 Cal. App. 3d 109 (1984); *Chevrolet Motor Division v. New Motor Vehicle Board*, 146 Cal. App. 3d 533 (1983); *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977).

abused its enforcement powers by issuing cease and desist letters, threatening criminal prosecution, and filing a cross-complaint for injunctive relief in this action. It further has the statutory authority to levy citations and fines against licensees and *non*licensees who violate Board statutes or regulations.[5] As testified to at trial in this matter, Rule 2 and its enforcement have a detrimental impact on the ability of non-CPAs to advertise their services to those most in need of them through the usual means of advertising – the telephone directory under the heading "Accountant."

That the Board's Rule 2 harms Bonnie Moore and other non-CPA accountants, to the benefit of CPAs permitted to easily and accurately advertise those same services, is clear. But it also harms the general public, the small business, the farmer, the sole practitioner, the individual in need of the accounting services described in Business and Professions Code section 5052 but without the wherewithal (or need) to pay a CPA. While CPAs must be qualified to perform highly technical audits, the usual individual or small business has no need for those sophisticated skills (and clearly should not be required to

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[5] Sections 125.9 and 125.95 of the California Business and Professions Code permit the Board of Accountancy to establish by regulation a system for the issuance of citations and fines to licensees and nonlicensees who violate the Board's statutes or regulations. The Board of Accountancy adopted rules to implement this authority in February 1990; under section 95.6, Division 1, Title 16 of the California Code of Regulations, the Board's executive officer is permitted to issue citations containing orders of abatement and administrative fines up to $2,500 per investigation against unlicensed persons who are performing acts for which licensure is required.

pay for them, or for the substantial overhead costs incurred by licensed CPA firms). Unlicensed firms such as Petitioner Accounting Center are not permitted to and do not perform at that technical and complex level, yet they are restricted from truthfully reaching those most in need of their services. When consumers who require accounting services are prevented from locating an entire class of providers, it is they who suffer irreparable harm – not the Board-licensed CPAs who adopted Rule 2 and have threatened criminal prosecution to enforce it.

In restricting consumers' access to non-CPA accountants by forbidding these practitioners from advertising their lawful accounting services openly, accurately, and in the manner most frequently used in the normal course of business, the CPA-controlled Board has effectively limited CPAs' competition for non-audit clients. The industry-dominated Board has allowed its substantial pecuniary interest to outweigh the strong policy against anticompetitive agency rulemaking and enforcement illustrated in *Carter, Gibson*, and *Bayside Timber*. This conduct by the Board violates the due process rights of Petitioners and those who would employ them.

## II. THE BOARD'S ACTION FAILS TO SATISFY THE "INDEPENDENT STATE SUPERVISION" REQUIREMENT TO WARRANT STATE ACTION IMMUNITY FROM FEDERAL ANTITRUST SCRUTINY

The federal Sherman Act, 15 U.S.C. section 1, prohibits combinations in restraint of trade. This federal statute is entitled to the full effect of the Supremacy

Clause, and applies to the anticompetitive conduct of states where it "affects" interstate commerce. The "affecting interstate commerce" criterion is broad and would clearly include a restriction applying to thousands of accountants in California, given their involvement in businesses engaged in interstate commerce. *See, e.g., McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980) (finding New Orleans real estate brokerage practices to "affect" interstate commerce due to an ancillary impact on interstate home financing and interstate title insurance charges).

An agreement by entrepreneurs to exclude those in horizontal competition is termed a "group boycott" or "concerted refusal to deal." Such behavior where horizontal in nature is often considered to be a *per se* violation of federal antitrust law. *Associated Press v. United States*, 326 U.S. 1 (1945). Recent decisions have qualified the *per se* rule to some extent, confining it to certain types of group boycotts and applying the "rule of reason" allowing consideration of a defense to others. The acts at issue here, if undertaken by a private trade association and without state sanction, would clearly constitute a group boycott, and probably of the *per se* type. *See Northwest Wholesale Stationers v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985); *see also Federal Trade Comm'n v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

The act of depriving one's competitors of the long-standing label used to identify their services by coercive means is here allowed only if it meets what has been termed "state action immunity." *See Parker v. Brown*, 317 U.S. 341 (1943). However, such "state action" is not conferred *tabula rasa*; the state must comply with a two-

pronged test in order to qualify for immunity from the application of federal antitrust law. First, the restraint of trade must be clearly articulated in state law with the purpose to displace competition. Second, the restraint must be subject to "active state supervision" by independent officials. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* ("*Midcal*"), 445 U.S. 97 (1980); *see also Federal Trade Comm'n v. Ticor Title Insurance Co.*, ___ U.S. ___, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992) ("the purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control. . . . The question is not how well state regulation works but whether the anticompetitive scheme is the State's own"). There is some question in the instant case whether the restraint at issue is authorized by law, since state law appears to countenance the use of the term "accountant" by those other than CPAs. The Board might argue that it has general authority to regulate and to displace competition, but the extension of legitimate authority to prevent misleading consumers into a cartel protection measure not countenanced by the enabling statute appears to raise some question.

The major question raised by the instant case, however, has to do with the second prong of the state action immunity test: the requirement of active and independent state supervision. This concept rests with a basic notion of unlawful delegation. The state may not delegate to private interests the role of guardian over a restraint of trade which benefits them, even if it wants to do so. In the leading case of *Midcal*, the Supreme Court held that the system of vertical price fixing clearly authorized by California law failed this second prong. There, the state

allowed liquor distillers to set resale prices and, although a state agency was purportedly required to review the proposed prices on behalf of the general public, it routinely rubber-stamped the prices submitted by the distillers without exercising *bona fide* independent supervision. The facts before the Court here would appear to be *a fortiori*; the parties who have adopted the anticompetitive regulation and who are interested in maintaining it are actually the state overseers. It would hardly have cured the *Midcal* defect for the state to create a board of eight liquor distillers and turn over to them the task of doing the rubber-stamping.

The rationale behind the "independent" element of the "independent state supervision" prong is here sorely tested. The purpose of the requirement appears to be an assurance that if the Supremacy Clause is to be laid aside and a state's restraint allowed to carve out an exception to the law of the land governing competition, the state must intend to regulate, and the state must do so independent from the economic interests benefiting from the restraint. "State action immunity" from federal antitrust application is not a *pro forma* blank check. States may not delegate to private parties that supervision, either by creating an agency which routinely defers to them, or by – arguably even worse – designating a cartel as an "agency" and declaring its supervision to be "independent."

## CONCLUSION

The Board contends that the use of the term "accountant" or "accounting" by nonlicensees is deceptive and misleading; however, it is the *Board's* restriction of the use of that term which is shamefully misleading. Under the Board's Rule 2, only Board licensees are "accountants" and may legally advertise "accounting" services. The CPA-controlled Board ignores the fact that the legislature has reserved a wide range of accounting services for non-CPA accountants, and has *not* precluded non-CPAs from using the terms "accountant" or "accounting." The Board's message to the public – that only Board-licensed CPAs are "accountants" – is legally erroneous, factually inaccurate, and a disgraceful display of industry-controlled cartel-like conduct which should never be permitted of a state agency with a mandate to protect the public. The livelihoods of almost one thousand members of the California Association of Independent Accountants and other unaffiliated non-CPA accountants have been curtailed without representation by a state licensing agency dominated by competitors – those with a substantial pecuniary interest in restricting the public's access to these nonlicensees.

Because adoption and enforcement of section 2, Division 1, Title 16 of the California Code of Regulations, has been and is being accomplished by a board which is constitutionally disqualified from so doing, and because the anticompetitive conduct at issue violates the federal antitrust laws and is not exempt therefrom, the Center for Public Interest Law urges this Honorable Court to grant

Petitioners' instant petition for writ of certiorari, invalidate Rule 2, reverse the lower courts' rulings, and vacate the injunction.

Dated: December 24, 1992.

ROBERT C. FELLMETH
JULIANNE B. D'ANGELO
Counsel for *Amicus Curiae*
Center for Public Interest Law

MOTION FILED
DEC 23 1992

No. 92-906

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1992

BONNIE MOORE, ACCOUNTING CENTER, and
CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS,
*Petitioners,*

VS.

CALIFORNIA STATE BOARD OF ACCOUNTANCY,
*Respondent.*

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

**In Support of Bonnie Moore, Accounting Center, and California Association of Independent Accounts, Petitioners**

**and**

## BRIEF OF AMICUS CURIAE

**In Support of Bonnie Moore, Accounting Center, and California Association of Independent Accounts, Petitioners.**

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CALIFORNIA STATE BOARD OF ACCOUNTANCY,
*Respondent.*

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

**In Support of Bonnie Moore, Accounting Center, and California Association of Independent Accounts, Petitioners.**

Motion is hereby made to this Court for leave to file a brief in this case as an amicus curiae. Consent of petitioners herein has been obtained, but the respondent, California State Board of Accountancy, has refused to consent.

California Society of Enrolled Agents has an interest in this case in that it is a professional society of California Enrolled Agents licensed by the Internal Revenue Service with authority to practice before it. In the course of their practice before the Service, Enrolled Agents perform accounting services for their clients as an integral part of preparing documents such as tax returns.

Most members of the California Society of Enrolled Agents are not licensed by the California State Board of Accountancy as either Certified Public Accountants or Public Accountants. The

State Board has in the past issued cease and desist letters to Enrolled Agents who employ the terms "accounting," "accountant," and "accounting services" in their advertising. As a result, Enrolled Agents who do business in California have a direct interest in this case because the State Board may, at any time, attempt to enforce the California Supreme Court's prohibition on the use of the terms "accounting," "accountant," and "accounting services" by Enrolled Agents to describe to the public the services they lawfully perform.

The purpose of the brief of amicus is to bring three relevant points to the attention of this Court:

1. Petitioners have pointed out that the California Supreme Court's mandatory disclaimer would mislead, rather than inform, the public. Amicus would point out also that the disclaimer, in reality, imposes an absolute prohibition of the use by unlicensed accountants of the generic terms, "accounting," "accountant," and "accounting services." That is so because the California Supreme Court requires any use of those terms to be accompanied by language which is both misleading and demeaning. No reasonable person would pay that price for the "freedom" to use the generic terms which most accurately describe his or her work. Consistent with the decisions of this Court, the California Supreme Court itself conceded those terms could not be absolutely prohibited because they were truthful and relevant within the purview of this Court's decisions in *Virginia Pharmacy Board v. Virginia Consumer Council* (1975) 425 U.S. 748 and its progeny. Yet that is precisely what the California Supreme Court did with the mandatory disclaimer it imposed *sua sponte*.

2. Petitioners have pointed out that the California Supreme Court's unilateral adoption of the mandatory disclaimer has denied the petitioners due process because petitioners were denied the opportunity to present an argument as to the propriety of the disclaimer or its content at any stage of the litigation here. Amicus would address in addition the potential impact of the California Supreme Court's unaccountable process of sanctioning a court-fashioned mandatory disclaimer which amounts to amendment of the State Board's regulation here at issue. In so doing, the California Court ignored and circumvented this Court's

mandate that any State must meet a heavy burden when it attempts to regulate speech which is truthful and relevant: the State must not only demonstrate its interest in regulating that speech but must also demonstrate its regulation is proportional to that interest. (*Peel v. Attorney Disciplinary Comm'n of Ill.* (1990) 496 U.S. 91, 109; *In re R.M.J.* (1982) 455 U.S. 191.) The California Court circumvents this mandate by concocting a compulsory disclaimer without any reference to the State's burden and without reversing the trial court's decision for further proceedings below by the California Legislature or the State Board.

3. Petitioners discuss the impact of the California Supreme Court's decision on unlicensed accountants in general. The amicus would show the specific impact on federally licensed Enrolled Agents who practice in the State of California.

The facts and questions of law set forth above are relevant to the disposition of the case because the critical issue in this case is the extent to which the California Supreme Court's decision, both procedurally and substantively, undermines the doctrine of commercial free speech as applied to speech which is truthful and relevant. That the California Court has, in reality, imposed an absolute prohibition on such speech despite this Court's consistent decisions otherwise is highly relevant to the disposition in this case. In addition, this Court should carefully scrutinize the summary process by which the California Supreme Court circumvented the necessity of a State to meet a heavy burden when it seeks to regulate speech which is truthful and relevant and *sua sponte* fashioned its own mandatory disclaimer.

It is also relevant for this Court to know the extent of the impact of this decision on accounting practitioners who are federally licensed but who are not licensed in California as well as the potential impact upon all nonlicensed professionals.

As documented above, the brief of amicus will bring additional relevant matters to this Court's attention. Therefore, we urge this Court to grant this motion for leave to file the amicus brief.

Dated:

Respectfully submitted,

JAMES G. SEELY
*Counsel for Amicus Curiae*
*California Society of Enrolled Agents*

No. 92-906

# In the Supreme Court

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BONNIE MOORE, ACCOUNTING CENTER, and
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*Respondent.*

## BRIEF OF AMICUS CURIAE
**In Support of Bonnie Moore, Accounting Center, and California Association of Independent Accounts, Petitioners.**

## INTEREST OF THE AMICUS CURIAE

By leave of this Court, California Society of Enrolled Agents, a California nonprofit mutual benefit corporation, files this brief as amicus curiae.

The California Society of Enrolled Agents is a nonprofit professional association incorporated in the State of California. Its membership consists of 3,500 individuals who practice in California. Enrolled Agents are those persons who are enrolled with the Internal Revenue Service such that they are entitled to practice before the Service. (See 31 C.F.R. § 10.2(a).) In the course of this practice, Enrolled Agents perform various accounting services for clients, including posting financial transactions, preparing general ledgers, and preparing financial statements.

California Enrolled Agents are not licensed by the California State Board of Accountancy as either Certified Public Accountants or Public Accountants. In the past, the State Board has issued cease and desist letters against Enrolled Agents who advertise their services by using the terms "accountant," "accounting," or "accounting services."

California Enrolled Agents admittedly perform lawful accounting services but are fearful of advertising that fact in light of the decision of the California Supreme Court. As a result, Enrolled Agents and their professional society, California Society of Enrolled Agents, have a very real interest in this case.

## SUMMARY OF ARGUMENT

This case involves a not-so-subtle perversion of the doctrine of commercial free speech in direct violation of *Virginia Pharmacy Board v. Virginia Consumer Council* (1975) 425 U.S. 748 and its progeny. The California Supreme Court conceded that the California State Board of Accountancy could not impose an absolute prohibition on the use of the terms "accountant," "accounting," and "accounting services" because those terms were factually accurate in that California specifically permits unlicensed practitioners to prepare financial reports and perform other basic accounting services. Despite this concession, the Court failed to reverse the trial court's decision which upheld the State Board's ban on the use of the terms without qualification. Instead, the California Supreme Court affirmed the decision of the intermediate court in which that court had concocted a mandatory disclaimer which required unlicensed practitioners, whenever they attempted to advertise accounting services, to also warn the public they were not licensed or the services they offered did not require a license.

By this disclaimer or warning, the California Supreme Court, in reality, imposed an absolute prohibition on the use of the terms "accountant," "accounting," and "accounting services" which prohibition it had already conceded was improper; no reasonable accounting practitioner would advertise accounting services in the way the disclaimer or warning would require.

This Court on numerous occasions has held that a State must meet a heavy burden when it would seek to regulate commercial speech which is truthful and relevant. In this case, the California Supreme Court has ignored that burden.

The California Supreme Court's unusual manner of proceeding resulted in the fact that it completely bypassed the normal way in which courts deal with constitutional challenges to State regulations. Instead of declaring the State Board's regulation to be invalid and reversing the decision of the trial court that had upheld it, the California Court simply rewrote the regulation. By so doing, the Court bypassed entirely the California Administrative Procedure Act (Cal. Govt. Code § 11340 et seq.) which requires regulatory agencies, among other things, to assess alternatives to proposed regulations in terms of effectiveness and their burden on persons who would be affected by the proposed regulations. Had the Court followed that process, it would have acted in consonance with this Court's holding in *In re R.M.J.* (1982) 455 U.S. 191 that restrictions on speech must be narrowly drawn and the State lawfully may regulate it only to the extent the regulation furthers the State's substantial interest.

As a result, the California Supreme Court has managed to itself amend a State regulation so as to impose an absolute prohibition on truthful and relevant commercial speech. At the same time, it has prevented both Petitioners and the State Board of Accountancy from participating in any meaningful way in the process of amending the regulation. The impact on the public here is great because the public is denied access to truthful and relevant information concerning the availability of accounting services in California. By subverting this Court's doctrine of commercial free speech through its adoption of a court-fashioned warning, the California Court has insulated its own amendment to the State Board's regulation from constitutional challenge.

This is a proper case for this Court to hear because the California Supreme Court's approach to the doctrine of commercial free speech cuts the heart out of the doctrine as applied to the right to disseminate truthful and relevant speech. The Court should act now to disapprove firmly of the California Supreme

Court's approach so other jurisdictions will be unmistakably advised such an approach is improper.

## ARGUMENT

### I

### THIS COURT SHOULD GRANT THE PETITION BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION THREATENS TO EVISCERATE THIS COURT'S DOCTRINE OF COMMERCIAL FREE SPEECH AS APPLIED TO THE USE OF TRUTHFUL AND RELEVANT SPEECH.

This case involves highly important principles of commercial free speech. In particular, the California State Board of Accountancy sought to enforce against Petitioners here its own regulation which reads as follows:

> The following are titles or designations likely to be confused with the titles Certified Public Accountant and Public Accountant within the meaning of section 5058 of the Business and Professions Code: (a) 'Accountant,' 'auditor,' 'accounting,' or 'auditing' when used either singularly or collectively or in conjunction with other titles. (b) Any other titles or designations which imply that the individual is engaged in the practice of public accountancy.

(Cal. Admin. Code, tit. 16, ch. 1, art. 1, reg. 2.)

The State Board asserted that the Petitioners here had violated the regulation because they were unlicensed and had employed the terms "accountant" and "accounting" (sometimes hereinafter referred to as "accounting" terms) in advertising their services. The petitioners maintained the terms "accountant" and "accounting" were generic, not false and misleading, and therefore protected by the First Amendment.

In its decision the California Supreme Court recognized, consistent with the First Amendment and decisions of this Court, the terms "accountant" and "accounting" could not be completely suppressed because petitioners were lawfully entitled to perform accounting services. However, the Court continued:

> As the rulings by the United States Supreme Court . . . make clear, in order to satisfy the First Amendment, appellants must be permitted to use the terms 'accountant,' 'accounting,' or 'accounting services,' if the use of those terms is further qualified by an explanation, disclaimer or warning stating that the advertiser is not licensed by the state, or that the services being offered do not require a state license, thereby eliminating any potential or likelihood of confusion regarding those terms.

(*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1023.)

The Court thus contrived its own mandatory disclaimer requiring an unlicensed accountant to state either that she is "not licensed by the state, or that the services being offered do not require a state license." The California Supreme Court's only explanation for its mandatory disclaimer was that it would eliminate "any potential or likelihood of confusion regarding the terms 'accountant,' 'accounting,' or 'accounting services.' " But, precisely the opposite would be true. The mandatory disclaimer is equivalent to this warning: "Buyer beware. You run a risk in hiring this accountant because she is not licensed and because you may require accounting services that require a license."

In reality, then, the disclaimer is so negative that no unlicensed accountant would incorporate it in any advertising designed to advise clients that lawful accounting services are being offered. Thus, the California Supreme Court, by inventing the disclaimer, has imposed an *absolute prohibition* of the use of the "accounting" terms.

Although the California Court gave lip service to this Court's holdings that the State could not absolutely prohibit the dissemination of accurate, factual information, the Court ignored this Court's decisions concerning the authority of the State to regulate this form of speech. This Court plainly and succinctly stated the controlling principle here when it said:

> The Commission's authority is necessarily constrained by the First Amendment to the Federal Constitution, and specifically by the principle that *disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information.* (citations) Even if we assume that Petitioner's letterhead may be potentially misleading to some consumers, that potential does not justify the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public.

(*Peel v. Attorney Disciplinary Comm'n of Ill.* (1990) 496 U.S. 91, 109; emphasis added.)

This Court has previously described the State's burden:

> Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. (Citations.) Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest.

(*In re R.M.J.* (1982) 455 U.S. 191, 203.)

Here, the California Supreme Court not only issued a categorical prohibition against the dissemination of accurate or factual information to the public, it also failed completely to acknowledge this Court's requirement which applies when the State seeks to regulate such speech: the State must meet a heavy burden demonstrating a substantial interest in regulating the speech and that any interference with that speech will be in proportion to the State interest served. Instead, the California Supreme Court failed even to mention the State's burden and concocted its own disclaimer. The California Court's failure to identify any State

interest and further failure to consider any alternatives to its onerous mandatory disclaimer thus falls short of this Court's decisions in *Peel* and *In re R.M.J.* Surely, this Court had in mind that a State would follow the recognized customary procedure for amendment of regulations when it attempted to salvage regulations which did not meet First Amendment standards.

As is the case in other states, regulations in California are not amended by courts but by regulatory agencies. These agencies must follow deliberate processes which provide for substantial input by interested parties before any amendment is finally adopted. Thus, the California Administrative Procedure Act (Cal. Govt. Code § 11340 et seq.) requires, among other things, notice by the regulatory agency of proposed amendment of a regulation (§ 11346.4), assessment by the agency of the potential for adverse economic impact on small business enterprises and individuals (§ 11346.53), *[a] description of the alternatives to the regulation considered by the agency and the agency's reasons for rejecting those alternatives, and a statement that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation*" (§ 11346.14(b); emphasis added), the opportunity for public comment (§ 11346.5(a)(9)), and the right to a public hearing (§ 11346.5(a)(11)).

California's statutory scheme for amending regulations is consistent with this Court's mandate that a State must first identify its interest and then fashion a regulation accordingly whenever the State attempts to regulate speech that provides accurate, factual information. But the California Supreme Court has not only ignored the basic substantive and procedural requirements for amendment of regulations, it has failed to follow any process at all in fashioning *sua sponte* its disclaimer.

The California Supreme Court's manner of proceeding here would effectively emasculate this Court's doctrine of commercial free speech when applied to accurate, factual speech. The California Court takes advantage of this Court's statements to the effect that the State may regulate accurate, factual speech. The Court ignores this Court's restrictions on the State's ability to regulate

because the California Court does not at all take into account the State's burden to demonstrate both its interest in regulating the speech in question and that it has adopted a regulation in proportion to that interest. Instead, it fashions its own disclaimer which serves as a complete suppression of the speech in question. In so doing, it eschews the normal course when a Court finds a regulation to be unconstitutional and does not reverse the decision of the lower court. By these means, the California Court has effectively foreclosed the petitioners from asserting their rights to engage in the process of determining what, if any, restriction of speech is appropriate here. Petitioners here have had no opportunity to comment upon the propriety or content of the Court's self-fashioned disclaimer. The California Court has also effectively foreclosed Petitioners from participating in a legislatively mandated process for amendment of regulations in California. The Petitioners have only one recourse: to this Court, expecting this Court will disapprove of the California Court's process and send a message to all courts that the doctrine of commercial free speech cannot be subverted in this manner.

## II

## THE CALIFORNIA DECISION BELOW WILL HAVE WIDE, ADVERSE IMPACT ON THE PUBLIC AND ON UNLICENSED ACCOUNTANTS.

The first and most telling real impact of the California Supreme Court's decision will be that an unlicensed accountant cannot communicate the true nature of the services she offers to the California public. As we have seen, these unlicensed accountants have been effectively foreclosed from using the "accounting" terms; they now may only advertise in terms that will distort the true nature of the accounting services they perform and desire to offer to the public. Advertising, censored in this way, will deprive the public of the benefits of competition. Because unlicensed accountants cannot advertise that they are accountants who provide accounting services, the public will be left with the untrue impression that only licensed accountants may perform accounting services.

This dilemma is illustrated by the example of the Enrolled Agent. The Enrolled Agent is licensed by the Internal Revenue Service to represent clients in all matters before the Service. The Service also regulates the Enrolled Agent in matters of advertising of services such that the Enrolled Agent may be disciplined for false or misleading advertising. (31 C.F.R., §§ 10.51(c), 10.30.)

Despite the fact that the Enrolled Agent is *federally* licensed and is regulated as to advertising by the Internal Revenue Service, the California State Board of Accountancy does not permit these Enrolled Agents who do business in California to advertise by using the "accounting" terms. (Whether the State Board has the authority to do so has not been litigated and is a question beyond the scope of this brief.) However, as the matter now stands, the decision of the California Supreme Court greatly inhibits Enrolled Agents from advertising even their federal tax accounting practices because of the continuing threat of enforcement by the California State Board of Accountancy. If Enrolled Agents cannot advertise they perform tax accounting services which are integral to the preparation of documents for submission to the Internal Revenue Service, potential clients of these Enrolled Agents are greatly disadvantaged because they are led to believe such services may only be performed by state licensed accountants.

In addition, this Court is urged to take notice of the dilemma of the Enrolled Agent who practices in more than one state. Assume an Enrolled Agent practices in a state which has no prohibition on the use of the "accounting" terms in the advertising of tax accounting services performed by an Enrolled Agent. Thus, that Enrolled Agent might employ stationery which identifies her as an Enrolled Agent/accountant. However, when that Enrolled Agent does business in California, she will be subject to the enforcement powers of the State Board of Accountancy. This Court's consideration of this case and rejection of the absolute prohibition on truthful and relevant advertising would bring uniformity of treatment of federally licensed Enrolled Agents throughout the United States.

Of course, the full impact of the California decision on the public and on all unlicensed persons throughout the United States, including Enrolled Agents, cannot be completely assessed. However, in the case at bar, no viable State interest has been offered in support of the California State Board of Accountancy's pseudo-paternalistic insistence on banning the use of the "accounting" terms in advertising by unlicensed accountants. In fact, the only sure effect of the State Board's ban (now the California Supreme Court's ban) on the use of the "accounting" terms is to reduce the competition for the provision of accounting services between two legally qualified groups and to promote the emergence of a near monopoly for one of these groups. This result has only been obtained by the California Supreme Court's perversion of this Court's doctrine of commercial free speech.

## CONCLUSION

We urge this Court to grant the petition for writ of certiorari so it may reinforce the principles of the commercial free speech doctrine. This Court should deal with the decision of the California Supreme Court which grossly misapplies that doctrine so as to uphold what, in reality, is a complete suppression of the dissemination of truthful and relevant information to the public. This Court should emphatically reject the approach of the California Supreme Court which circumvents this Court's decisions and permits the State, through a State Board dominated by licensed accountants, to stifle perfectly valid competition from unlicensed persons to the detriment of the public.

Dated: December 22, 1992.

Respectfully submitted,

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